Supreme Court, U.S.
FILED

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No. 94-

IN THE
Supreme Court of the United States

October 1994 Term

CMK Construction, Inc., *et.al.*,
Petitioners,
v.
Carpenters' Pension Trust Fund - Detroit and Vicinity, *et. al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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July 14, 1995

4/6RP

QUESTIONS PRESENTED

1. Whether a District Court in a suit for enforcement of a labor contract pursuant to § 301 of the Labor Management Relations Act must follow a prior National Labor Relations Board unit determination regarding the applicability of the contract at issue in the § 301 suit.

2. Whether a collective bargaining agreement can survive as a valid, enforceable contract if the "no-strike clause" is not in effect.

LIST OF PARTIES

DEFENDANTS-PETITIONERS:

CMK CONSTRUCTION, INC.
A&J INSULATION CORPORATION
A.J. CARPENTRY
CARPENTRY BY MASTERCRAFT
DAMICO CARPENTRY
ROBERT DANNA
CARPENTRY CONTRACTOR, INC.
F.G. CONSTRUCTION CO.
FRF OAKLAND
HILLS CARPENTRY
FIBER CLASS INSULATION
GERICK CONTRACTORS
HALE & SONS CONSTRUCTION
GEORGE I. LANDRY, INC.
LEO & KEVIN LIEDEL CONSTRUCTION
MICHIGAN CARPENTRY SYSTEMS, INC.
MICHIGAN DRYWALL, INC.
PALMER CUSTOM BUILDERS, INC.
RICHARD PARKER CARPENTER CONTRACTOR
RESAC HOMES, INC.
S&N DRYWALL, INC.
SUBURBAN INSULATION COMPANY
T&C DRYWALL, INC.
TROY CARPENTRY

PLAINTIFFS-RESPONDENTS:

CARPENTERS' PENSION TRUST FUND-DETROIT AND VICINITY
CARPENTERS' HEALTH AND WELFARE FUND, DETROIT
CARPENTER'S VACATION & HOLIDAY TRUST FUND, DETROIT & VICINITY

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United States Court of Appeals for the Sixth Circuit Opinion, filed January 12, 1995

United States Court of Appeals for the Sixth Circuit Order Denying Petition for Rehearing, filed February 17, 1995

IN THE
Supreme Court of the United States

October 1994 Term

CMK Construction, Inc., *et.al.*,
Petitioners,
v.
Carpenters' Pension Trust Fund - Detroit and Vicinity, *et. al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CMK Construction, Inc., *et. al.*, petition this Court for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review the judgment in *Carpenters' Pension Trust Fund - Detroit and Vicinity, et. al. v. CMK Construction, Inc., et. al.*. Respondents are Carpenters' Pension Trust Fund - Detroit and Vicinity, *et. al.*, fringe benefit funds existing pursuant to collective bargaining agreements between Petitioners and The United Brotherhood of Carpenters and Joiners of America.

STATEMENT OF JURISDICTION

This Petition for Writ of Certiorari is an appeal of a judgment by the United States Court of Appeals for the Sixth Circuit which was filed January 12, 1995, regarding § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. §185, and §502(A)(3) and §515 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. 1132(A)(3) and 1145. The Sixth Circuit Court of Appeals denied a Petition for Rehearing on February 17, 1995. This Court granted an extension of time within which to file the Petition for Writ of Certiorari on May 3, 1995, the terms of which were to extend the time for filing a petition for a writ of certiorari to and including July 17, 1995.

The statutory provision believed to confer jurisdiction on this Court is 28 U.S.C. 1254(1).

STATUTE INVOLVED

The statute involved in this case is §301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. 185, which states:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any District Court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

I. Basis for Federal Jurisdiction

Respondent funds brought their claims under §301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. 185, and §§502(A)(3) and 515 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. 1132(A)(3) and 1145. LMRA §301 provides that suits for breach of collective bargaining agreements may be brought in the federal district courts. ERISA §§502(A)(3) and 515 grant fringe benefit fund fiduciaries the right to pursue claims for delinquent contributions required under collective bargaining agreements.

II. Statement of Facts

A. Bargaining History

This case is a claim by Respondent funds against Petitioner employers for unpaid fringe benefit fund contributions on behalf of"residential" carpentry employees in addition to "commercial" carpentry employees pursuant to an "International Agreement" between Petitioners and the United Brotherhood of Carpenters and Joiners of America. Petitioners are carpentry contractors who were represented by the Michigan Carpentry Contractors Association ('MCCA") for purposes of collective bargaining.

One of the long standing practices throughout the construction industry is for employers to negotiate "local" contracts to cover the work they perform in their home area of business. If a construction employer is interested in performing construction work outside his home area, or any work not covered by his local agreement, he can enter into a "Traveling" or "International" agreement with the International Union, which applies to any work done outside his home area or not covered by his local agreement, and which is typically a form contract. (Tr., 5/19/92, 96).[1] When a contractor has an International Agreement, the only work it does not apply to is work performed in the contractor's home area; a contractor's *local agreement* continues to cover work performed in his home area. (Tr., 5/19/92, 96-97). Traveling agreements are designed to allow employers who perform work outside their home area to do union work without negotiating a separate contract in each location, and typically provide for application of a local agreement with another employer in effect in the area where the work is being performed.[2]

The MCCA has negotiated contracts on behalf of its member employers with Local 1234 and the Carpenters District Council of Detroit and Southeastern Michigan ("District Council") of the United Brotherhood of Carpenters and Joiners of America ("the Union"), for over 20 years. Until 1989, every contract negotiated between the MCCA and the union was specifically for *local residential* work to be performed

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[1] References to trial transcript are stated as Tr. ___; trial exhibits are referenced as Pl. Ex. ___ or Def. Ex. ___; All referenced transcripts and exhibits have been filed with the clerk as Lodgings, and are not attached to this petition.

[2] The International Agreement entered by the MCCA was a typical forum traveling agreement; it provided for wages and fringe benefits to be paid pursuant to the local contract in the area the work was performed.

by MCCA members in their 'home" area of southeastern Michigan.[3]

B. Background to Signing the International Agreement

In the late 1980s some MCCA member employers were interested in pursuing commercial work in addition to residential work, and were interested in obtaining a contract with the Union to cover their commercial employees since the local agreement only covered their residential employees. They requested that the MCCA enter an International Agreement with the International Union to cover their commercial employees so they would not have to negotiate individual commercial agreements.[4]

At trial, Don Doughty testified that in early April 1989, he negotiated the International Agreement on behalf of the MCCA with Dean Souter, Vice President for the International Carpenters Union (Tr., 5/19/92, 117). Doughty further testified that the reason the MCCA was interested in negotiating the International Agreement was because some MCCA members were doing commercial work in addition to residential work and the MCCA did not have an agreement with the Union covering commercial work (only residential work). (Tr., 5/19/92, 118) In his conversations with Souter, Doughty expressed concern that entering into the International Agreement not jeopardize the MCCA's position in local negotiations, i.e., for a Residential Agreement. (Tr., 5/19/92, 119) Souter assured him it would *not jeopardize local negotiations.* (Tr., 5/19/92, 119)

Doughty further testified that on April 26, 1989 he wrote a letter to Souter to verify that by signing an International Agreement the MCCA did not jeopardize its position in upcoming negotiations with residential carpenters Local 1234, that is the MCCA still retains its right to negotiation with Carpenters Local 1234 for residential work in its area.

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[3] Since the majority of MCCA members did not perform commercial carpentry work, and the terms of commercial contracts are often significantly different from residential contracts, there was no need for the MCCA to enter a commercial contract.

[4] For example, if an MCCA area employer did *commercial work anywhere*, including within the 11-county MCCA home area, the International Agreement would apply, since the employer did not have a local commercial agreement. Also, if an MCCA employer did either residential or commercial carpentry work in Cincinnati, the International Agreement would apply; if the same employer did residential carpentry work in the 11-county MCCA jurisdiction, the MCCA Local Residential Agreement would apply. *The only issue in this case is whether the International Agreement applied to the local residential employee group, not the applicability to the other three groups.*

(Pl. Ex. 14, April 26, 1989 letter) Souter responded in a May 5, 1989 letter (Tr. Ex. 15), stating as follows:

> Second, it is possible for an international signatory to participate in negotiations for a Local Agreement in their home area while still holding the international agreement. When this occurs, the no strike clause would not be in effect with respect to that area where the employer is engaged in local bargaining.

Souter went on to say:

> While your local negotiations were going on, the no strike clause of the International Agreement would not be in effect for MCCA members on residential work within Local 1234's territorial area. Once an agreement was signed between Local 1234 and the MCCA, those terms would also be applied under the International Agreement to MCCA. . .

Doughty sent a June 12, 1989 letter to Souter (Pl. Ex. 15) "Just to make sure we were in complete understanding of the agreement we had agreed to." (Tr., 5/19/92, 122) Souter responded on June 20, 1989 (Pl. Ex. 15, June 20 letter) again stating that "for residential work with the International Agreement, the employer would apply the Detroit District Council conditions in Genesee County *only* and the Local 1234 conditions for all other counties covered by Local 1234."[5]

Doughty testified that the International Agreement would not affect *local* MCCA negotiations. (Tr., 5/19/92, 123) The Residential Agreement continued to cover residential employees and the International Agreement covered commercial employees.

Doughty further testified that at no time did the International Union lead the MCCA to believe that the MCCA and its members could be bound by a residential contract in the MCCA's home jurisdiction that the MCCA had not negotiated and signed. (Tr., 5/19/92, 124)

Against the above-stated background of negotiations, the International Agreement was signed by the MCCA July 10, 1989, to be in effect until July 10, 1992. Pursuant to the International Agreement,

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[5] The MCCA has never negotiated for residential employees in Genesee County. The MCCA only negotiated for residential employees within an 11-county area which was administered by Local 1234. When Local 1234 was taken over by the District Council, the MCCA continued to negotiate in August 1990 for residential employees covering the former Local 1234 territory only, i.e., the 11-county area and *only* for residential employees.

the MCCA employers who performed commercial work began making contributions to Respondent funds on behalf of their *commercial* employees at the rates established in the applicable local commercial agreement between the Union and other employers of commercial carpenters.

C. The Local Residential Agreement Expires on August 1, 1990

The Local Residential Agreement ("Residential Agreement") which was effective beginning August 1, 1989 expired August 1, 1990. (Pl. Ex. 10). The Residential Agreement required that Petitioners make fringe benefit contributions to Respondents, The Carpenters Union Pension Health and Welfare and Vacation and Holiday Trust Funds, on behalf of the *residential* employees during the term of the agreement. (Pl. Ex. 10).

During the Summer of 1990, the MCCA attempted to negotiate a new Residential Agreement with the District Council. (Tr., 5/19/92, 76). After the Residential Agreement expired on or about August 1, 1990, Petitioners discontinued contributions to the Funds for residential employees. The Union then struck.[6] (Tr., 5/19/92, 79) The strike lasted approximately four days. (Tr., 5/19/92, 80) The Union returned to work. The parties continued negotiating for over a year but no new MCCA Residential Agreement was negotiated until February 20, 1992. (Tr., 5/19/92, 101) Between August, 1990 and February 20, 1992, essentially all MCCA employers did not make Fund contributions on behalf of the residential employees, based on the absence of a Residential Agreement in that time period.

III. Procedural History

A. The Union Files Unfair Labor Practice Charges Which Are Dismissed by the NLRB

On August 20, 1990 the District Council filed an unfair labor practice

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[6] Prior to the August 1990 negotiations, the MCCA had always negotiated its own Local Agreement. In August 1990, negotiations were for a "new applicable Local Agreement with MCCA." (Tr., 5/19/92, 77-78) The MCCA-negotiated Local Agreement that applied to MCCA members covered residential work. (Tr., 5/19/92, 78). The Union took the position "no contract, no work" and residential projects were struck. At no time did the Union even raise the question of an international agreement during negotiations, or that the International Agreement applied to the residential employees, even though the Union's Chief Negotiator, William Fair, was both a business agent for the Union and a trustee of Respondent Funds. (Tr., 5/19/92, 78-79)

charge with the NLRB alleging that the MCCA had unilaterally changed terms and conditions of employment without bargaining in good faith regarding the Residential Agreement. (Def. Ex. 18) (Tr., 5/19/92, 80) In its charge, the Union alleged that the MCCA had improperly stopped making contributions to the Funds on behalf of residential employees since the MCCA had allegedly not bargained to impasse on the Residential Agreement (Tr., 5/19/92, 82-83); *the Union did not allege that the International Agreement required employers to make contributions on behalf of the residential employees.*[7] Contemporaneously, the President of the International Union, Sigurd Lucassen, acknowledged that the International Agreement only applied to commercial carpentry employees, not residential employees, as evidenced by his letter to Doughty dated August 22, 1990:

> It is our understanding that the MCCA has participated in the negotiations with the Detroit and Southeastern Michigan District Council for a new local Residential Agreement. However, as stated in your letter, the MCCA does not participate in the local negotiations for the commercial agreement and MCCA member contractors have been and continue to comply with the negotiated wages and benefits under the local commercial agreement. Therefore, any work stoppage by the District Council against MCCA member contractors can only affect residential projects.

One of the remedies requested by the Union in its NLRB charge was to have the NLRB order MCCA members to reinstate contributions to the Funds on behalf of residential employees and make back payments to the Funds on behalf of residential employees, pursuant to the expired Residential Agreement, but *not* pursuant to the existing International Agreement. (Tr., 5/19/92, 84).

On June 18, 1991, one day after this lawsuit was filed, Regional Director Bernard Gottfried dismissed the Union's unfair labor practice

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[7] The charge the Union filed stated that the MCCA failed to bargain in good faith by, inter alia, "refusing to furnish the Union with information requested by the Union to support the Association's claim that its members are unable to maintain the existing wage and fringe benefit structure and, in fact, need substantial decreases to avoid going out of business". The charge was filed by the Union's counsel, a law firm which represents both the District Council and the Appellee Funds. (Tr., 5/19/92, 85) The chief negotiator for the Union was William Fair, who is both a business agent for the Union and a Trustee of the Appellee Funds. (Tr., 5/19/92, 85)

charge, finding that the Residential Agreement (Pl. Ex. 10) was a Section 8(f) agreement:

> I conclude . . . that the parties created a bargaining relationship privileged under Section 8(f) of the Act through the successive Collective Bargaining Agreements. Consequently, upon expiration of the latest Contract on August 1, 1990, *the Charging Party no longer enjoyed a presumption of representative status.* (Emphasis added) Therefore, it cannot now avail itself of the panoply of safeguards afforded to Section 9(a), representatives contained in Section 8(a)(5) of the Act. John Deklewa and Sons, Inc., 282 NLRB 1375 (1987). Based upon the above I find that further proceedings are unwarranted and the charge is therefore dismissed. (Def. Proposed Ex. 18)

This meant that upon expiration of the Residential Agreement (Pl. Ex. 10) the Union no longer had the right to represent MCCA member residential employees. The District Council appealed Regional Director Gottfried's dismissal.[8] (Def. Proposed Ex. 18, June 28, 1991 letter) The appeal was denied. (Def. Proposed Ex. 18)[9]

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[8] The reason for the passing of approximately ten months between the filing of the charge and dismissal was that the NLRB originally issued a Complaint against Appellants for unilateral change of working conditions by reason of Appellants' discontinuance of Fund contributions. After realizing that the applicable Collective Bargaining Agreement (the Residential Agreement, as all parties agreed and understood) was a Section 8(f) agreement, the NLRB ordered the Union to show cause why the Complaint should not be dismissed. The Union still did not allege that the International Agreement applied in any way to the residential employees. Upon failing to show that the Residential Agreement required continued contributions, the NLRB dismissed the Complaint.

[9] Section 8(f) of the LMRA permits employers engaged in the building and construction industry to enter into a "pre-hire agreement" notwithstanding the undetermined majority status of the Union. The NLRB in Deklewa held, inter alia, that there is no presumption of majority status upon the expiration of Section 8(f) agreements and that either party may terminate the relationship at that time. John Deklewa and Sons, Inc., 282 N.L.R.B. 1375; 124 L.R.R.M. 185 (1987).

Section 8(f) provides in relevant part that:

> It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged . . . in the building and construction industry with a labor organization of which building and construction employers are members . . . because (1) the majority status of such labor organization has not been established under the provisions of Section 9 of this Act prior to making such agreement . . .

B. This Lawsuit is Filed In the Face of the NLRB's Dismissal

This lawsuit was filed on June 17, 1991. Respondent Funds filed this lawsuit relying on the International Agreement between the International Union and the MCCA, which was in effect until July 10, 1992. (Pl. Ex. 1)

The International Agreement, a standard form agreement, states with respect to fringe benefit contributions:

> The Company agrees to recognize the jurisdictional claims of the UBCJA and to comply with the contractual wages, *fringe benefits*, hours and other working conditions established between the UBCJA affiliates and the employers recognized and employer agencies, and the localities in which the Company does any work within the jurisdiction of the UBCJA.
>
> Payment of pension and/or health and welfare contributions for employees work in each locality shall be made to such funds and in such amounts that are identified in the applicable Collective Bargaining Agreement for that locality. (emphasis added)
>
> (Pl. Ex. 1).

C. A Second NLRB Charge is Filed

Six weeks after this lawsuit was filed, on August 6, 1991, an unfair labor practice charge was filed against MCCA member Harris Homes, Inc. by a residential employee/union member, Jan Baddor. Baddor claimed, inter alia, that Harris Homes was required to pay his fringe benefits under the terms of the International Agreement. (Def. Proposed Ex. 18).

The NLRB considered the residential employee's charge, identified it as a §8 unfair labor practice charge, and dismissed the charge on the basis that the residential employees were covered by the Residential Agreement between the parties which had expired on August 1, 1990, and were not covered by the International Agreement. The NLRB found that since the residential contract was a §8(f) relationship, the Union no longer represented the employee and the employer was no longer required to make pension and welfare contributions on behalf of this or any other residential employee. The NLRB's decision was consistent with its decision on the earlier charge filed by the union, except that *in the second charge the NLRB was faced with the same allegation that the court was faced with in this suit, that the International Agreement required contributions to the funds on behalf of the residential*

employees, as opposed to the union simply alleging that the expired Residential Agreement required contributions. The dismissal was not appealed.

D. The Trial Judge Refuses to Consider the NLRB Representational Decision

The trial of Respondents' action in the District Court was held before the Honorable Horace W. Gilmore, United States District Judge, on May 18, 19, 20 and 21, 1992. Petitioners proffered as evidence the two earlier NLRB proceedings and dismissals and the testimony of the NLRB Regional Director. Judge Gilmore *refused* to even consider the prior NLRB proceedings and orders and the testimony of the Regional Director. Judge Gilmore found that the International Agreement applied to residential employees, which was in direct conflict with the NLRB determination that the International Agreement did not apply to residential employees. Judge Gilmore further found that the International Agreement required Petitioners to make fringe benefit contributions for the residential employees for the period of August 1990 through February 1, 1992, the time period during which there was no Residential Agreement in effect.[10] Judge Gilmore further found that the expiration of Petitioners' Residential Agreement did not affect Petitioners' liability to pay Respondent funds on behalf of residential carpentry employees, but only affected the rate of fringe benefit payments, which was also in direct conflict with the NLRB determinations. Judge Gilmore found that Petitioners were bound through the International Agreement to local residential wage agreements which Petitioners were not parties to, but which were negotiated by other area employers, which was also in direct conflict with the NLRB determinations. (Tr., 5/21/92, 2-11).

The Sixth Circuit Court of Appeals found that even though there were representational issues involved, the District Court did not err in refusing to consider the prior NLRB representational determination.

ARGUMENT FOR ALLOWANCE OF THE WRIT

The Sixth Circuit Court of Appeals in this case found no error in

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[10] After the expiration of the Residential Agreement between the Union and the MCCA in August 1990, the Union and MCCA did not enter another Residential Agreement until February 1, 1992.

the District Court's refusal to follow or even consider the previous NLRB decision on the issues presented in the suit. That decision raises an important question of federal law which has not been, but should be, settled by this Court, and was in conflict with prior decisions of this Court and other Circuit Courts of Appeals.

This Court held in Garner v. Teamsters, Local 776, 346 U.S. 485 (1953), San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959), and Kaiser Steel Corp. v. Mullins, 455 U.S. 72 (1982), that the NLRB has primary jurisdiction to make the initial determination of whether an issue is a §7 or §8 unfair labor practice ("ULP") issue. After the NLRB makes the determination that the issue is a §7 or §8 ULP issue, it can then exercise its jurisdiction to decide the representational issues involved, which impacts on the basic right to bargain. *Id.*[11]

This court held in Smith v. Evening News Association, 371 U.S. 195 (1962), that the courts and the NLRB have concurrent jurisdiction over matters that have both representational and contractual components. The ninth circuit later clarified the doctrine of concurrent jurisdiction when it held that once the NLRB has exercised its primary jurisdiction, determined that there are representational issues, and decided on the merits of the representational issues, the court must at least consider the prior NLRB proceedings to determine whether the issues in the suit are indeed the same as the issues decided by the NLRB. Local 46 v. McClatchy Newspapers, 762 F.2d 741 (9th Cir. 1985). The fifth, seventh, and eighth circuits have held that when the issues are the same or interrelated, the court should defer to the NLRB's expertise by following the NLRB's determination;[12] the court should not make a bare contractual decision which conflicts with the NLRB determination and ignores national labor policy. This Court should now exercise jurisdiction to determine that District Courts are required to follow prior NLRB representational decisions when deciding § 301 actions.

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[11] By contrast, if the NLRB determines that the issue is not a §7 or §8 issue, and there is a contract interpretation issue with no apparent representational aspects, the NLRB should decline to exercise jurisdiction over the merits of the issue.

[12] Carpenters Local 1846 v. Pratt-Farnsworth, 690 F.2d 489 (5th Cir. 1982), Smith Steelworkers v. A.O. Smith Corp., 420 F.2d 1 (7th Cir. 1969), Local 204 v. Iowa Electric Power and Light Co., 668 F.2d 413 (8th Cir. 1982). The ninth circuit has held that fringe benefit funds are bound by a prior NLRB determination even if they were not named parties in the NLRB action. Local 342 v. Valley Engineers, 975 F.2d 611 (9th Cir. 1992).

I. Whether a Court is Required to Follow a Prior NLRB Determination is an Important, Unsettled Question of Federal Law

Whether a court in a §301 action is required to follow a prior NLRB determination regarding the dispute before it is an important question of federal law which has not been, but should be, settled by this Court.

This Court in Smith v. Evening News Association, 371 U.S. 195 (1962), established the concurrent jurisdiction of the District Courts and the NLRB over §301 actions that also involved representational issues. This Court stated that if "there are situations in which serious problems will arise from both the courts and the Board having jurisdiction over acts which amount to an unfair labor practice, we shall face those cases when they arise." *Id.* at 197 - 198. This is one of those cases.

Courts have recognized, as this Court did in Smith, that there can be a difficult 'gray" area due to the concurrent jurisdiction that the NLRB and the courts share over issues that are both representational and contractual under §301. While there are several decisions across the circuits addressing whether the NLRB or the courts should *initially* hear a case which is both representational and contractual, that is not the situation in this case. This case concerns the deference due to the NLRB by the courts if the NLRB has already decided the representational issue *prior* to the court's decision of the contractual issue. There have been relatively few cases addressing this issue, and those that have addressed it have stated without hesitation or qualification that the NLRB determination should be followed if conflicting results would be reached otherwise.

The cases acknowledge and follow the legislative history of the LMRA and the primary jurisdiction of the NLRB over representational matters. As this Court stated in Garner v. Teamsters, Local 776, 346 U.S. 485 (1953):

> Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide interpretation and application of its rules to a specific and specially constituted tribunal and proscribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administrative of specially designed procedures was necessary to obtain uniform application of its

> substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies . . . a multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law . . .

Id. at 490-491.

Similarly, the Second Circuit in McGuire v. Humble Oil and Refining Co., 355 F.2d 352 (2d Cir. 1966), acknowledged that all the facts, including the union features of a case, are to be taken into consideration by a District Court in deciding a §301 issue, as opposed to a mere contractual interpretation. Id at 357. The basic right to bargain is a unique union feature of a collective bargaining agreement, and prior NLRB representational proceedings which impact on the right to bargain should be taken into consideration and followed when conflicting results would otherwise be reached.

In this case, the NLRB determined that the International Agreement did not apply to the residential employees. That decision clarified that the employers maintained their right to bargain over the terms and conditions of employment for their residential employees, notwithstanding the existence of a current, unexpired international agreement. The Union even acknowledged that only the Local Residential Agreement, and not the International Agreement, covered the residential employees when it (1) negotiated for fringe benefits during the negotiations for a new Residential Agreement, and (2) filed a charge with the NLRB to compel contributions to the funds on behalf of the residential employees and only relied on the expired Residential Agreement. The Union stated in its charge that the MCCA failed to bargain in good faith by, inter alia, "refusing to furnish the Union with information requested by the Union to support the Association's claim that its members are unable to maintain the existing wage and fringe benefit structure...". If the Union thought the International Agreement applied to the residential employees, it would have relied on the International Agreement in its NLRB charge to compel contributions. Indeed, if the Union thought the International Agreement applied to the residential employees it would not have even entered negotiations for a new Residential Agreement, since the International Agreement was in effect until July 10, 1992.

The facts of this case also raise a second important question of federal law - the application of international agreements in the

construction industry. Labor relations in the construction industry, perhaps more so than in other industries due to the unique aspects of the construction industry, has long standing, nationally recognized practices regarding representation, the right to bargain, and contract interpretation. The NLRB determination that the International Agreement did not apply to the residential employees was based on its expertise regarding national labor policy, specifically within the construction industry, and furthered the obvious relationship between the parties. The NLRB recognized that the parties' relationship was that of the general practice in the construction industry of utilizing both local and international agreements for different kinds and locations of work, without confusion regarding when one applies and when the other applies. The NLRB recognized that construction employers and unions across the nation utilize international agreements for "travel" work only, and the international agreements they enter do not limit or impact their right to bargain over local agreements in any way, regardless of the standard, "canned" language used in the International Agreement. The NLRB recognized that under this national policy in the construction industry, the residential employees were only covered by the Residential Agreement, not the International Agreement, and the employers' signing of the International Agreement did not impact their right to bargain over the local residential contract. The court should have followed that representational determination in the § 301 suit instead of making a de novo review of the bare contract language. The court's decision changes the common understanding and working knowledge of construction employers and unions across the nation.

This Court has not decided how conflicts between the NLRB and the courts should be resolved after Smith. This Court should exercise jurisdiction to clarify that when the NLRB has made a representational decision, especially one that involves the basic right to bargain, and a court is later deciding a § 301 suit, the court must follow the NLRB determination to ensure the § 301 decision is made in light of national labor policy.

II. The Sixth Circuit's Opinion Conflicts with Applicable Decisions of this Court

The District Court and Court of Appeals findings that the District Court could ignore the NLRB representational determination conflict with this Court's decisions regarding the primary jurisdiction of the NLRB over matters which are arguably subject to § 7 or § 8 of the

LMRA. The District Court and Court of Appeals findings that the International Agreement could apply to the residential employees even without the no-strike clause in effect also conflict with decisions of this Court, decisions which are at the heart of national labor policy.

A. The NLRB Had Jurisdiction to Determine Whether there Was a § 7 or § 8 Unfair Labor Practice Issue and The District Court Should Have Followed the NLRB's Representational Determination

This Court in San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959), held that "When an activity is *arguably s*ubject to § 7 or § 8 of the [National Labor Relations] Act, the states as well as *the federal courts must defer to the exclusive competence of the National Labor Relations Board . . . .*" 359 U.S. at 245 (emphasis added).

While the Garmon case involved an action in state court, this court later held in Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 83 (1982):

> The Board is vested with primary jurisdiction to determine what is or is not an unfair labor practice. As a general rule, federal courts do not have jurisdiction over activity which 'is *arguably* subject to § 7 or § 8 of the [NLRA]," and they 'must defer to the exclusive competence of the National Labor Relations Board." (citations omitted) (emphasis added)

In Kaiser Steel this Court found that the resolution of a § 301 action by trustees to enforce an agreement to contribute to employee funds was dependent on the NLRB first making an unfair labor practice decision, and therefore deferred the case to the NLRB for an initial determination of the unfair labor practice issue.[13] In this case, when the residential carpentry employee filed a charge with the NLRB, the NLRB had primary jurisdiction to decide whether the issue presented was a § 7 or § 8 unfair labor practice charge under the LMRA, and jurisdiction to make the initial determination of the unfair labor practice issue, which included finding that the International Agreement did not apply to the residential employees. The District Court should have followed the NLRB determination instead of refusing to even consider it.

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[13] The Fifth Circuit Court of Appeals in American Barge Lines v. Seafarers, 730 F.2d 327 (5th Cir. 1984) applied the Garmon primary jurisdiction doctrine to a § 302 suit by an employer, stating that the NLRB is in the best position to view the various unfair labor practice and contractual issues presented by such a case, "not each in an isolated analysis under § 302, but against the backdrop of the entire collective bargaining process . . ." Id. at 336.

The Sixth Circuit acknowledged that there were representational issues involved in the case, but merely stated that since the NLRB did not have *exclusive* jurisdiction, the court did have jurisdiction to decide the case without regard to the NLRB unit determination. While the NLRB and the court did have concurrent jurisdiction initially, once the NLRB made a representational determination the court did not have the option of completely disregarding the NLRB determination, and should have followed the NLRB's representational determination.

This Court has not decided the specific issue of whether the Courts in a § 301 action must follow a prior NLRB representational determination, but in Carey v. Westinghouse Electric Corp., 375 U.S. 261 (1964) this Court opined that in a § 301 action the federal courts can decide representational issues "Even though an alternative remedy before the NLRB is available, which, if invoked by the employer, will protect him." *Id.* at 268. That statement implies that if the NLRB determination is rendered prior to the court's consideration of the issue the employer is justified in relying on the NLRB determination to "protect him." This Court should now exercise jurisdiction to determine that District Courts are required to follow prior NLRB representational determinations when deciding § 301 actions.

B. There is No Valid Contract if the "No-Strike Clause" is Not Operational

In their evaluations of the applicability of the International Agreement to the residential employees, the District Court and the Court of Appeals considered the interactions between the MCCA and the Union which led to the signing of the International Agreement, primarily the series of letters exchanged. Both courts found that the only agreement reached regarding the applicability of the International Agreement was that the "no-strike clause" would not apply to local (residential) negotiations. *The courts then found that the remainder of the International Agreement's boilerplate language did apply to the residential employees. Such a finding is inconsistent with decisions of this Court that there is no valid contract without the quid pro quo of a no-strike clause.*

This Court has long held that the no-strike clause is the quid pro quo for the contract. Without a no-strike clause there can be no contract since there is no quid pro quo. See Carey v. Westinghouse Electric Corp., 375 U.S. 261 (1964). The D.C. Circuit Court in 1982 said

> This [no-strike] clause is often at the very center of the bargaining process. An employer may be willing to pay considerable price — in terms of higher wages and fringe benefits, for example, for a no-strike clause, especially if it is important that its plant and equipment remain operating and productive throughout the life of the contract. The giving of a covenant not to strike may be just as important to the Union, particularly in cases in which the acquisition of the new benefit is a substantial issue with the rank and file. See, N.L.R.B. v. Magnavox Company of Tennessee, 415 U.S. 322, 325 (1974). N.L.R.B. v. Deauville Hotel, 751 F.2d 1562 (D.C. Cir. 1985).

A Union may agree to a no-strike clause in return for a grievance and arbitration procedure. See, Alexander v. Gardner-Denver Company, 415 U.S. 36, 51 (1974). A Union may waive its member's right to strike in return for an economic benefit for employees, and when the majority of the Union membership is willing to give up the right to strike for a quid pro quo and ratifies a contract with a no-strike clause, the contract and clause is binding on every member, even those who did not "agree" to give up their right to strike. N.L.R.B. v. Allis-Chambers Manufacturing Co., 388 U.S. 175, 180 (1967). In addition to fostering peaceful resolution of a labor-management conflict, no-strike clauses enhance the flow of the nation's commerce by ensuring that plants and equipment, the means of transporting goods, and the provision of services remain in operation and on schedule. See, Mastro Plastics Corp. v. N.L.R.B., 350 U.S. 270 (1956).

The policy of the National Labor Relations Act is to peacefully resolve labor disputes. A no-strike clause encourages collective bargaining and promotes the peaceful resolution of labor management conflict and furthers the objectives of the National Labor Relations Act. See, Local 174 Teamsters v. Lucas Flour Company, 369 U.S. 95, 105 (1962). Courts have said that the chief advantage which an employer can reasonably expect from a collective bargaining agreement is assurance of uninterrupted operating during the term of the agreement. See, Eazor Express Inc. v. International Brotherhood of Teamsters, 520 F.2d 951, 960 (3d Cir. 1975), cert. den., 424 U.S. 935 (1976); see, also, United Electrical, Radio and Machine Workers of America v. N.L.R.B., 223 F.2d 338, 341 (D.C. Cir. 1955), cert. den., 350 U.S. 981 (1956).

Courts consistently hold that strikes violating no-strike clauses are not protected by the National Labor Relations Act and that the discharge

of employees who engage in such strikes is not an unfair labor practice. See, N.L.R.B. v. City Disposal Systems, Inc., 465 U.S. 822 (1984).

The NLRB, in its evaluation of the application of the International Agreement, found that it did not apply to the residential employees. The NLRB considered the overall relationship of the parties in the context of national labor policy. The International Agreement is a standard agreement used by the union with all employers who are interested in obtaining a traveling agreement. There are blanks to fill in for the name of the employer; the remainder of the agreement is boilerplate. When the MCCA requested an international agreement it specifically explained to the Union that it wanted the agreement for the sole purpose of pursuing commercial carpentry work. The MCCA also expressed considerable concern that the International Agreement not affect its residential ("local") contract and negotiations for residential employees. The Union assured the MCCA that the International Agreement would not affect the residential employees by explaining that the no-strike clause would be inapplicable to residential employees. Since there cannot be a contract without a no-strike clause, in labor relations terms that assurance said that the residential employees were not covered by the International Agreement.

A year later, when the residential contract had expired, Sigurd Lucassen, the President of the International Union, confirmed the parties' understanding in his August 22, 1990 letter to Don Doughty, restating the distinction between the International Agreement covering the commercial employees and the Residential (local) Agreement covering the residential employees, with the employers maintaining their right to bargain over terms and conditions for local residential employees.

The NLRB acknowledged the understanding of the parties by finding that the International Agreement did not apply to the residential employees. The NLRB determination took into consideration the national labor policy aspects of the relationship between the parties, and recognized that there can be no contract without a no-strike clause. *The NLRB understood that even if the Union wanted all aspects of the International Agreement except the no-strike clause to apply to the residential employees, without the no-strike clause the agreement is stripped of its quid pro quo, and therefore is void. That decision was consistent with the decisions of this Court, and should have been followed by the District Court and the Sixth Circuit.* This case should be reviewed not only because there was no valid contract in effect, but

also because the decision will encourage strikes during the term of contracts which is contrary to the purpose of the N.L.R.A., which was passed by Congress to provide a peaceful means of resolving labor-management disputes.

III. The Sixth Circuit Decision Conflicts with Decisions of the Other Circuit Courts of Appeals

A. The NLRB, Not the Courts, Was in the Best Position to Decide that the International Agreement Did Not Apply to the Residential Employees

Both the Second Circuit Court of Appeals and the Ninth Circuit Court of Appeals have held that if the issue of whether a contract applies to a particular employee, or whether there is any contract at all, is dependent upon an NLRB determination, the NLRB determination must be made before a § 301 action can be maintained. In this case, the NLRB determined that the International Agreement did not apply to the residential employees; the court should have followed that determination.

The Second Circuit in McGuire v. Humble Oil and Refining Co., 355 F.2d 352 (2nd Cir. 1966), was presented with a situation where a union filed a § 301 suit seeking to compel arbitration based on the arbitration terms of a collective bargaining agreement with the employer. The employer, Humble Oil, had purchased a previous employer, Weber and Quinn. The union filing the § 301 action had represented the employees while they were employed by the previous employer, Weber and Quinn. The current employer, Humble Oil, then filed a charge with the NLRB seeking a unit clarification. The NLRB, pursuant to Garmon, exercised jurisdiction and found that the Union no longer represented the employees. The District Court did not follow the NLRB's representational finding and made a determination on the § 301 action that the employer was required to arbitrate the claims of the previous union. The Court of Appeals reversed, stating that the District Court failed "to realize that all the facts, including the union features of the case, are to be taken into consideration in deciding the primary and controlling question of whether or not there is an obligation or "agreement.'" Id. at 357. The Court of Appeals went on to state that since the NLRB determination had not been challenged in the courts, it was final and binding on all concerned. Id. at 357.

Similarly, in Local 342 v. Valley Engineers, 975 F.2d 611 (9th Cir. 1992), the Union filed a § 301 action in the District Court to compel an

employer that was not a party to its contract with another employer to be covered by the contract on an alter ego theory. The Ninth Circuit Court of Appeals stated:

> In the areas of the NLRB's primary jurisdiction, the District Courts must tread lightly. '[T]he doctrine of primary jurisdiction is a recognition of congressional intent to have matters of national labor policy decided in the first instance by the National Labor Relations Board.' Glaziers and Glassworkers Local Union No. 767 v. Custom Auto Glass Dist., 689 F.2d 1339, 1342 (9th Cir. 1982). (notations omitted).

Id. at 613.

The court went on to acknowledge that in § 301 cases the District Courts and the NLRB have concurrent jurisdiction, but stated that "District Courts must continue to defer when, on close examination, § 301 cases fall within the NLRB's *primary* jurisdiction." (emphasis added). *Id.* at 613 - 614.[14]

The court also stated that "Where the interpretation of the contract depends entirely on the resolution of the question of whom the union represents, the matter is properly left to the Board." (citations omitted) *Id.* at 614.

The Court of Appeals held that once the NLRB had made its determination there was nothing left for the court to do, and letting the suit go forward would have produced conflicting or redundant judgments and a great deal of wasted effort and expense. The court also stated that once the regional director's report became final, the union suit amounted to a collateral attack on that determination. *Id.* at 615.

The Second Circuit Court of Appeals in McGuire and the Ninth Circuit Court of Appeals in Valley Engineers held that the NLRB, not the courts, should decide whether or not a contract applies to a particular group of employees, and once it has decided, the court should follow the NLRB determination. In this case, the NLRB determined that the International Agreement did not apply to the residential employees, but the courts ignored the NLRB determination and found that it did apply. The Sixth Circuit Court of Appeals was in direct conflict with the Second Circuit in McGuire and the Ninth Circuit in

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[14] This statement is consistent with this Court's decisions in Garner and Garmon that the NLRB's primary jurisdiction allows it to decide whether an issue is an unfair labor practice issue and then decide the merits of the issue, including representational issues, for the court to follow in deciding the § 301 action.

Valley Engineers.

The Sixth Circuit in this case obviously did not make its decision in light of "the union features of the case". If it had, it would have considered the prior NLRB determination and found that the NLRB determination that the International Agreement did not apply was determinative of the § 301 contractual claims. While the courts considered the representational issue, they did not do so with the expertise and knowledge that the NLRB used in deciding the same issue. The NLRB had the knowledge and understanding of the construction industry and the relationship between the parties that led to the International Agreement. The courts did not have that expertise and refused to even consider the NLRB's expertise. The NLRB used its expertise on the issue to reach a determination that best fit "the union features of the case", and furthered national labor policy - that the International Agreement did not apply to residential employees.

Finding that the International Agreement applies to residential employees also negates local bargaining relationships across the construction industry, which is directly contrary to the working relationships and common understandings of construction employers and concomitant unions that are parties to both local and international agreements. The NLRB was cognizant of such a drastic potential result due to its expertise, and it found that the parties could not have intended for the International Agreement to apply to the residential employees. The courts should have followed the NLRB determination as the Second and Ninth Circuits required.

B. After the NLRB Determined the Representational Issue The District Court Should Have Considered And Accepted the NLRB's Determination

As an initial procedural requirement, the Ninth Circuit Court of Appeals has held that when a District Court is faced with a § 301 action, where there is also a pending or existing NLRB representational determination, the District Court *must consider* whether the NLRB determination requires preclusion of the § 301 action. Proceeding with the analysis, this Court, as well as the Fifth Circuit and Seventh Circuit, have held that where there is both a contract claim under § 301 and a representational issue, the NLRB determination *is dispositive* if it is made prior to the decision in the § 301 action.

In this case the Sixth Circuit Court of Appeals upheld the District Court's refusal to consider the NLRB's representational determination

in the present case. However, the Ninth Circuit Court of Appeals in Local 46 v. McClatchy Newspapers, 762 F.2d 741 (9th Cir. 1985) found that it was reversible error for the District Court to refuse to consider the NLRB's determination. In McClatchy there were conflicting decisions by an arbitrator and by the NLRB regarding the interpretation of the contract between the Union and employer regarding whether or not the contract required strikers to be reinstated. The NLRB had interpreted the contract and found that the employer did not waive its right to hire permanent strike replacements and, therefore, the failure to reinstate strikers was *not* an unfair labor practice. The arbitrator interpreted the same contract and determined that the employer *was* obligated to reinstate the strikers.

In McClatchy, the Ninth Circuit Court of Appeals stated that when a contractual interpretation issue *is closely related* to an unfair labor practice charge or representational issue, the District Court is required to exercise its discretion to determine whether the proceedings in the § 301 action should be stayed until a final disposition of the NLRB proceeding. The court acknowledged that the District Court is not necessarily required to stay the § 301 action[15], *Id.* at 746 - 747, but stated that *a final NLRB determination would have collateral estoppel effect on the § 301 suit as long as the issues were sufficiently inter-related. Id.* at 747 - 748. The court held that the prior factual findings by the NLRB should have been considered by the District Court to evaluate the likelihood that the final determination by the NLRB would require preclusion. The court stated that the District Court's failure to consider the relevant factors brought forth by the employer in the NLRB case was a failure to exercise its discretion and hence an abuse of that discretion. *Id.* at 748 - 749. The court stated that if the issue raised *national labor policy* questions as opposed to purely contractual issues, the NLRB's final determination of the representational issue must be given collateral estoppel effect. The court also stated that *two logically inconsistent judgments cannot both be enforced when a representational issue is at stake.* The court reiterated the overall policy in support of

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[15] Most of the circuits have consistently held that the decision whether to stay the § 301 action pending final resolution of the NLRB determination is within the court's discretion, should be based on how closely related the representational and contractual issues are, and should be decided in favor of staying the action if conflicting decisions would result. See, e.g., American Commercial Barge Lines v. Seafarers, 730 F2d 327 (5th Cir. 1984), Northern Cal. Dist. Council of Hod Carriers v. Opinski, 673 F2d 1074 (9th Cir. 1982).

the NLRB's primary jurisdiction under Garmon by stating "Deference to the Board's decision [is] warranted because the Board must take a 'broader view,' and consider not only the agreement before it, but the effect of its decision on all parties in light of the policy surrounding representation." *Id.* at 749.

As in McClatchy, the District Court in this case was faced with a § 301 suit to enforce a collective bargaining agreement while the same issue was pending before the National Labor Relations Board on an unfair labor practice charge. The NLRB had primary jurisdiction under Garmon to decide whether the issue involved was an unfair labor practice charge, and according to McClatchy, it was an abuse of the court's discretion to refuse to even consider the NLRB proceedings. The NLRB determination impacted national labor policy by enforcing the long standing interpretation of international agreements in the construction industry as not applying to work covered by local agreements.

The court's decision in this case led to "two logically inconsistent judgments" conflicting with an NLRB determination involving national labor policy, and should be reversed. Once the NLRB determined that the issue was an unfair labor practice issue and made a representational determination which impacted the construction industry components of national labor policy, the District Court erred in not giving collateral estoppel effect to the NLRB's determination on the issue. If the Sixth Circuit had made a decision consistent with the Ninth Circuit in McClatchy it would have found that the District Court judge abused his discretion in not considering and giving collateral estoppel effect to the final NLRB determination(s) in this case.

Taking the analysis a step beyond McClatchy, to the point where the NLRB has made a final determination of the representational issue that is at issue in the § 301 suit, there are decisions by the other circuits in accord with this Court's statement in Carey, that if the NLRB makes the representational determination before the court's consideration of the § 301 action, the NLRB determination should be followed by the court. The Sixth Circuit decision in this case is in conflict with those decisions.

The Seventh Circuit in Smith Steelworkers v. AO Smith Corp., 420 F.2d 1 (7th Cir. 1969) addressed the issue of the union filing suit under § 301 to compel arbitration and to set aside an NLRB representational determination. The NLRB had made a representational determination regarding the appropriate boundaries between two unions at the same

employer. The union that was denied representational rights by the NLRB order notified the company that it expected the company to continue to recognize the union. When the company refused and explained that it considered itself to be bound by the NLRB's representational determination the union recommended arbitration in accordance with the collective bargaining agreement. When the employer did not reply to the union's request for arbitration, the union filed the § 301 action. *The District Court dismissed the action on the ground that it lacked jurisdiction to set aside the NLRB's determination, and that it could not compel the company to comply with the arbitration terms of the agreement, since such a requirement would be in direct conflict with the NLRB representational determination.* The Court of Appeals upheld the District Court and stated that the NLRB's representational determination fully disposed of the question raised by the § 301 suit. The Court of Appeals stated that the NLRB determination "defined the lawful limits of coverage of the contract which the Union sought to have enforced under § 301(A)." Id. at 7.

Similarly, in Local 204 v. Iowa Electric Light and Power Co., 668 F.2d 413 (8th Cir. 1982), the Union had petitioned the NLRB for an accretion of quality control inspectors to the bargaining unit. An election designating the Union as the bargaining representative for the employees was certified by the regional director of the NLRB. When the company refused to meet the Union's demands for the new employees the Union filed suit for breach of contract under §301. The court stated that *if a court is presented with a situation which amounts to District Court review of the merits of a representational issue, the situation holds the possibility for a tangled mass of judicial and administrative conflict.* Id. at 419. The court vacated the District Court decision in the case with directions to dismiss for lack of jurisdiction.

In Iowa Electric the court emphasized:

> [T]here is a 'very, very strong policy' of using the procedures for representational determinations vested in the NLRB in order to promote industrial peace. This policy obviously has been recognized by the labor bar which has sought resolution of almost all representational problems through NLRB proceedings, with the only judicial involvement coming pursuant to judicial review of Board action pursuant to the Act. . . . to fail to apply this policy to § 301 actions would allow an 'end run' around provisions of the NLRA under the guise of contract interpretation. (citations omitted)

Id. at 418 - 419.

In accord with the Seventh and Eighth Circuit Courts, The Fifth Circuit Court of Appeals in Carpenters Local 1846 v. Pratt-Farnsworth, 690 F.2d 489 (5th Cir. 1982), emphasized that if the NLRB has already decided a representational issue, the court should follow that determination in a § 301 action. In Pratt-Farnsworth the court found that as long as there was no NLRB exercise of jurisdiction, the court's concurrent jurisdiction pursuant to Smith allowed the court to decide representational issues. The court emphasized that if the NLRB had already exercised jurisdiction, the result would be different (i.e., that the District Court should not exercise jurisdiction over the representational issues of the § 301 suit if the NLRB has already exercised jurisdiction over them), and made a thorough analysis of the distinct differences between a § 301 suit in which there is pending or final NLRB action and a § 301 suit where there is not any NLRB action. The court stated:

> [D]eference to the expertise of the Board in unit determinations should be encouraged whenever possible . . . [when] a unit determination has been made by the Board and a disgruntled party seeks to circumvent it through a de novo determination by a federal court under the guise of a § 301 action . . . the outcome might be very different [than a § 301 suit without any pending or final Board action].

Id. at 515 - 517.

The court stated that *if a unit determination has been made by the NLRB and not appealed, and the court is then faced with a § 301 action, the logical procedure is to simply accept the unit determination of the NLRB as conclusive . . . .* *Id.* at 517, n.12. In further support of giving deference to the NLRB determination, the court stated that even though the District Courts have jurisdiction over representational issues in § 301 suits as long as the NLRB has not exercised jurisdiction, '[W]e think that a District Court has a duty, in deciding under § 301 whether to enforce a collective bargaining agreement, to make that decision in a fashion consistent with the policies embodied in our federal labor laws." *Id.* at 518. This approach of deference to the NLRB is consistent with the deference shown in McClatchy, explaining the importance of the NLRB's primary jurisdiction under Garmon, that the NLRB has a 'broader view" encompassing the national labor policy, not just the interpretation of a single contract.

In this case there was a prior NLRB unit determination that the

International Agreement did not apply to the local residential employees. The NLRB defined the lawful limits of the International Agreement. The employers relied on and complied with the NLRB determination, as the parties did in A.O. Smith and Iowa Electric.[16] The Sixth Circuit Court of Appeals should have reached a decision consistent with A.O. Smith, Iowa Electric, and Pratt-Farnsworth and required the District Court to defer to the NLRB's expertise in unit determinations. If the District Court had deferred to the NLRB's representational determination in this case, it would have recognized that since the International Agreement did not apply to the residential carpentry employees there was no basis on which to proceed with the § 301 action.[17] The Court of Appeals' affirmation of that decision directly conflicts with the Seventh, Eighth, and Fifth Circuit's decisions in A.O. Smith, Iowa Electric, and Pratt-Farnsworth that the District Court should have followed the NLRB's representational determination.

C. The NLRB's Representational Determination Was Collateral Estoppel to the Funds as Well as to the Union

A determination of fact by the NLRB will be accorded collateral estoppel effect if it is made in a proceeding fully complying with procedural and substantive due process, and if the findings are upon material issues supported by substantial evidence. Paramount Transport Systems v. Chauffeurs, Etc., Local 150, 436 F.2d 1064 (9th Cir. 1971); N.L.R.B. v. Heyman, 541 F.2d 796, 802 (9th Cir. 1976) (Kennedy, J. concurring). While the general rule is that a litigant is not bound by a prior decision in a proceeding in which it was not a party, if "a person, although not a party, has his interests adequately represented by someone with the same interests who is a party," an earlier judgment will bind him in subsequent proceedings. Martin v. Wilkes, 490 U.S. 755, 762 n. 2 (1989).

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[16] The employers continued contributions on behalf of their *commercial* carpentry employees pursuant to the International Agreement since the International Agreement applied to the commercial carpentry employees. The employers did not continue contributions on behalf of the *residential* carpentry employees since the Residential Agreement had expired in August of 1990 and the NLRB had held that the International Agreement did not apply to the residential employees.

[17] The Tenth Circuit in Trustees of Iron Workers Fund v. A&P Steel, 812 F.2d 1518, followed the Fifth Circuit Pratt-Farnsworth decision in acknowledging that federal courts can resolve representational issues that arise in the limited context of a genuine § 301 contract dispute as long as the representational issue is not pending before the NLRB. *Id.* at 1525.

In Valley Engineers three employee pension funds were the plaintiffs seeking to extend a collective bargaining agreement to another employer's employees. The NLRB determination that was determined to be dispositive of the § 301 issue had been brought by one of the employers. The funds argued that since they were not a party to the NLRB proceedings, the NLRB proceedings could not be given collateral estoppel effect in their § 301 suit against the employers. The court found that since one of the trustee plaintiffs in the § 301 action was also the business manager of the local, and since, in general, the Local's interests were so closely aligned with the funds' interests which benefit its members, it would not violate the guarantees of due process to bind the funds to the regional director's determination, and the NLRB decision was collateral estoppel to the Funds even though the Funds were not parties to the NLRB proceedings. In the present case, half of the trustees are representatives of the employers of MCCA and half of the trustees are business agents of the Union. The Union's business agent and chief negotiator for the Residential Agreement with the MCCA is William Fair; Mr. Fair is also a trustee of Respondent Funds. As in Valley Engineers, the District Court and the Court of Appeals should have held that the NLRB's prior determination was collateral estoppel to the funds' action in this case.

To find that the funds are not bound by determinations of the NLRB would be inconsistent with national labor policy. The funds exist due to the agreement between the Union and the employers, and the NLRB has jurisdiction to decide the representational aspects of those contracts. As such, the funds are dependent on the agreement for their very existence; they cannot rise to a level higher than that of a party to the contract merely by not being a direct party to an NLRB proceeding which affects the contract they exist under. The funds were sufficiently represented in the prior NLRB proceedings due to half of their trustees being union business agents and half of their trustees being agents of the employers. The parties need to be able to rely on the finality of NLRB determinations. The funds cannot be allowed to challenge an NLRB determination via a § 301 action. This Court should exercise jurisdiction to determine that a prior NLRB representational determination is collateral estoppel to fringe benefit funds which exist pursuant to the contract at issue.

CONCLUSION

This Court acknowledged in Smith that difficulties could arise by the courts and the NLRB having concurrent jurisdiction over § 301 actions. Since Smith the Courts of Appeals have required District Courts to consider and follow prior NLRB decisions which impact on the issues involved in § 301 actions. The Sixth Circuit in this case affirmed the District Court's refusal to consider or follow the prior NLRB decision which was dispositive of the issues involved in the § 301 suit. The decision eliminates parties' ability to rely on NLRB determinations, and was not the result this Court intended when it established concurrent jurisdiction in Smith.

The decisions below also affect national labor policy and long standing practices within the construction industry regarding international agreements and their applicability to local bargaining. The courts below did not make their decisions in light of national labor policy. The decisions, if allowed to stand, negate the purpose behind local negotiations and take away employers' ability to negotiate over the terms and conditions of their employment of carpenters. The decisions cannot be allowed to stand with such nonsensical results.

For the foregoing reasons, this Court should grant a writ of certiorari to the Court of Appeals for the Sixth Circuit to review its decision in this case and reinforce the principle of courts following the NLRB's expertise when the NLRB has made a decision which impacts the issues in a § 301 action.

Respectfully submitted,
GUNSBERG AND BRESKIN, P.C.

By _____

David B. Gunsberg (P24235)
Attorney for Petitioners
1400 N. Woodward Avenue, Suite 200
Bloomfield Hills, Michigan 48304

Dated: July 14, 1995

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION

MICHIGAN CARPENTRY CONTRACTORS ASSOCIATION, INC.,

and

Case No. 7-CA-30913

CARPENTERS DISTRICT COUNSEL OF DETROIT AND SOUTHEASTERN MICHIGAN

ORDER WITHDRAWING COMPLAINT, DISMISSING CHARGE, AND WITHDRAWING NOTICE OF HEARING

On September 14, 1990, the Regional Director issued a Complaint in the above case. Subsequently, the Respondent filed an Answer to the Complaint. Thereafter, on May 9, 1991, the Regional Director issued an Order to Show Cause why the Complaint should not be dismissed. The Charging Party filed a response to the Order to Show Cause on May 23, 1991, and provided supplemental information in a letter dated June 4, 1991. For the reasons set forth i the attached Summary Report, it no longer appears that there is any basis upon which to find and conclude that the Respondent has violated Section 8(a)(1) and (5) of the Act as alleged in the Complaint. Accordingly,

IT IS FURTHER ORDERED that the Complaint issued in Case No. 7-CA-30913 be, and hereby is, withdrawn in its entirety.

IT IS FURTHER ORDERED that the charge filed in Case No. 7-CA-39013 be, and hereby is, dismissed.[1]

IT IS FURTHER ORDERED that the Notice of Hearing issued on September 14, 1990, in Case No. 7-CA-30913 be, and hereby is, withdrawn.

Dated at Detroit, Michigan this 18th day of June, 1991.

(SEAL)

/s/ Bernard Gottfried
Bernard Gottfried, Regional Director
National Labor Relations Board
Seventh Region
Patrick V. McNamara Federal Building
477 Michigan Avenue - Room 300
Detroit, Michigan 48226

[1] Enclosed Form NLRB-4938 sets forth the procedure and deadline for Filing an Appeal of this dismissal action.

September 10, 1991

Jon J. Badder
106 Rebellion Drive
Flint, Michigan 48507

Re: Harris Homes, Inc.
Case No. 7-CA-32175

Dear Mr. Badder:

The above-captioned case, charging violations under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, it appears that further proceedings are not warranted at this time. A written summary report of the basis for my conclusions is attached hereto.

Please refer to enclosed Form NLRB-4938 as to the procedure and deadline for filing an appeal of my dismissal action.

Very truly yours,

William C. Schaub, Jr.,
Acting Regional Director

MBO/bm

Enc. Form NLRB-4767 - 'Notice of Appeal"
Form NLRB-4938 - 'Procedures for Filing an Appeal"

cc: General Counsel

Marvin Breskin
Miller, Canfield, Paddock and Stone
1400 N. Woodward Avenue, Suite 100
P.O. Box 2014
Bloomfield Hills, MI 48303-2014

Harris Homes, Inc.
3576 Gensley
Ann Arbor, MI 48103

Re: Harris Homes, Inc.
Case No. 7-CA-32175

SUMMARY REPORT

The charge in the above-captioned case was filed by an individual on August 6, 1991, alleging that Harris Homes, Inc., ('the Employer") unilaterally discontinued payment of pension and welfare contributions.

The investigation disclosed that by virtue of Section 8(f) of the Act, the Carpenters District Council of Detroit and Southeastern Michigan was the exclusive representative of journeymen and apprentice carpenters within its jurisdiction and was a party to a collective bargaining agreement with Michigan Carpentry Contractor Association, of which the Employer is a member. The investigation further disclosed that the collective bargaining agreement expired on or about August 1, 1990, and was not renewed. Thus, the Employer is no longer under an obligation to make pension and welfare contributions on behalf of its employees. Accordingly, I find there is insufficient evidence to sustain a violation of the Act and the charge is hereby dismissed.

September 30, 1991

Re: Michigan Carpentry Contractors Assn.
Case No. 7-CA-30913

George H. Kruszewski, Esq.
100 Farmer Street
Detroit, Michigan 48226-2834

Dear Mr. Kruszewski:

Your appeal from the Regional Director's Order Withdrawing Complaint, Dismissing Charge, and Withdrawing Notice of Hearing in the above-captioned case has been carefully considered.

The appeal is denied substantially for the reasons set forth in the Summary Report attached to the Regional Director's Order Withdrawing Complaint dated June 18, 1991. Contrary to the assertions on appeal, the evidence was insufficient to support the allegation that the successive collective bargaining agreement being negotiated contained a provision voluntarily recognizing the Union. Therefore, the burden could not be met of establishing that the Union herein, is the Section 9(a) representatives of the Employer's employees. Thus, even while an employer voluntarily agrees to continue a relationship after the expiration of the 8(f) contract, this does not bring into play all of the obligations of Section 8(a)(5) of the Act. John Deklewa and Sons, Inc., 282 NLRB 1375 (1987).

Accordingly, further proceedings herein were deemed unwarranted.

Sincerely yours,

Jerry M. Hunter
General Counsel

By _____

Mary M. Shanklin, Director
Office of Appeals

cc: Director, Region 7
David B. Gunsberg, Esq., P.O. Box 2014, Suite 100, Bloomfield Hills, Michigan 48303
Michigan Carpentry Contractors Assn., Inc., 24225 West 9 Mile Road, Suite 108, Southfield, Michigan 48034, Attn: H.D. LaVere
Carpenters Dist. Council of Detroit & Southeastern Michigan, 1401 Farrow, Ferndale, Michigan 48220

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CARPENTERS' PENSION
TRUST FUND-DETROIT
AND VICINITY; DETROIT
CARPENTERS' HEALTH
AND WELFARE FUND;
and CARPENTER'S
VACATION AND
HOLIDAY FUND-DETROIT
AND VICINITY,
trust funds established under and
administered pursuant to Federal law,

Plaintiffs,

v.

Case No. 91 CV 72984 DT
Hon. Horace W. Gilmore

CMK CONSTRUCTION,
INC., et al,

Defendants.
_____/

SACHS, WALDMAN, O'HARE, HELVESTON,
HODGES & BARNES, P.C.
George H. Kruszewski (P25857)
Attorney for Plaintiffs
1000 Farmer Street
Detroit, Michigan 48226
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GUNSBERG AND BRESKIN, P.C.
David B. Gunsberg (P24235)
Attorney for Defendants
1400 North Woodward Avenue, Suite 200
Bloomfield Hills, Michigan 48304
Telephone No. (313) 646-9090
_____/

FINAL JUDGMENT

At a session of said Court, held in the U.S. Courthouse, City of Detroit, State of Michigan on September 7, 1993

PRESENT: Hon. Horace W. Gilmore
United States District Judge

In accordance with this Court's May 21, 1992 Findings of Fact and Conclusions of Law, its August 13, 1992 Order, and the June 30, 1993 Amended Report and Recommendation of Magistrate Virginia M. Morgan, which was adopted by the Court by Order dated August 9, 1993:

(1) I find that the following defendants properly made contributions to the plaintiffs from the period of August 15, 1990 through February 1, 1992 and that IT IS ORDERED AND ADJUSTED that these defendants are dismissed from this action with prejudice:

a. Blue Ribbon Carpentry
b. Carpentry by K&H
c. Harris Homes
d. IDR Carpentry
e. Norhill Specialties
f. United Custom Awning

(2) IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff Carpenters' Pension Trust Fund - Detroit and Vicinity shall recover from the below-listed defendants the sum set forth opposite each defendant's name:

Defendant	
CMK Construction	$ 22,079.00
A&J Insulation	$ 5,448.16
Carpentry by Mastercraft	$ 30,204.37
Damico Carpentry	$ 65,339.65
Robert Danna Carpentry	$ 87,832.94
F.G. Construction	$ 23,814.45
FRF Oakland Hills Carpentry	$ 3,213.19
Gerick Contractors	$ 1,209.61
Hale & Sons	$ 25,003.56
George Landry, Inc.	$ 2,795.67

Liedel Construction Co.	$ 16,539.13
Michigan Carpentry Systems	$183,455.46
Michigan Drywall	$ 5,591.62
Palmer Custom Builders	$ 5,303.22
Richard Parker	$ 14,085.43
Resac Homes	$ 23,114.47
S&N Drywall	$ 13,604.29
T&C Drywall	$ 15,621.58
Troy Carpentry	$ 9,446.41
TOTAL:	$553,702.21

(3) IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff Detroit Carpenters' Health and Welfare Fund shall recover from the below-listed defendants the sum set forth opposite each defendant's name:

CMK Construction	$ 33,958.10
A&J Insulation	$ 8,297.30
Carpentry by Mastercraft	$ 45,416.80
Damico Carpentry	$101.038.08
Robert Danna Carpentry	$133,130.25
F.G. Construction	$ 37.715.70
FRF Oakland Hills Carpentry	$ 4,895.00
Gerick Contractors	$ 1,788.60
Hale & Sons	$ 38,328.40
George Landry, Inc.	$ 4,532.55
Liedel Construction Co.	$ 26,397.25
Michigan Carpentry Co.	$282,249.55
Michigan Drywall	$ 8,346.80
Palmer Custom Builders	$ 7,825.40
Richard Parker	$ 22,303.60
Resac Homes	$ 35,970.00
S&N Drywall	$ 19,880.10
T&C Drywall	$ 23,387.65
Troy Carpentry	$ 14,390.75
TOTAL:	$849,851.88

(4) IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff Carpenters' Vacation and Holiday Trust Fund - Detroit and Vicinity shall recover from the below-listed defendants the sum set forth opposite each defendant's name:

CMK Construction	$ 11,576.63
A&J Insulation	$ 2,354.63
Carpentry by Mastercraft	$ 8,779.53
Damico Carpentry	$ 34,444.80
Robert Danna Carpentry	$ 27,666.67
F.G. Construction	$ 9,216.09
FRF Oakland Hills Carpentry	$ 1,668.75
Gerick Contractors	$ 609.75
Hale & Sons	$ 13,066.51
George Landry, Inc.	$ 1,545.19
Liedel Construction Co.	$ 8,999.07
Michigan Carpentry Co.	$ 44,140.93
Michigan Drywall	$ 2,845.50
Richard Parker	$ 1,609.68
Resac Homes	$ 6,282.59
S&N Drywall	$ 7,287.88
T&C Drywall	$ 7,972.94
Troy Carpentry	$ 4,905.94
TOTAL:	$194,973.08

(5) Finally, in accordance with 29 USC §1132(g)(2), (B), (C), and (D), IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs shall recover from the defendants (a) double interest on the unpaid contributions, with interest determined by using the rate prescribed under 29 USC §1621; and (b) reasonable attorneys' fees and costs of the action. Following entry of judgment, the judgment will bear interest pursuant to 29 USC 1961(a).

Horace W. Gilmore
United States District Court Judge

Dated: September 7, 1993

NOT FOR PUBLICATION

93-2274

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CARPENTERS' PENSION TRUST FUND- DETROIT AND VICINITY, et al	)	
	)	ON APPEAL FROM
ON APPEAL FROM THE	)	THE UNITED STATES
Plaintiffs,	)	DISTRICT COURT
UNITED STATES DISTRICT	)	FOR THE EASTERN
v.	)	DISTRICT OF
COURT FOR THE EASTERN	)	MICHIGAN
DISTRICT OF MICHIGAN	)	SOUTHERN DIVISION
CMK CONSTRUCTION, INC., et al,	)	
SOUTHERN DIVISION	)	
Defendants.	)	

BEFORE: KEITH, JONES and MILBURN, Circuit Judges

PER CURIAM: The Defendants-Appellants appeal from the September 7, 1993 final judgment of the United STates District Court for the Eastern District of Michigan. For the reasons following, we **AFFIRM**.

I. STATEMENT OF THE CASE

A. Procedural History

This appeal arises from a claim lodged by the Plaintiffs-Appellees, Carpenters' Pension Trust Fund - Detroit and Vicinity; Detroit Carpenters' Health and Welfare Fund; and Carpenters' Vacation and Holiday Trust Fund - Detroit and Vicinity (the 'Funds"), against several Carpentry Contractors for failure to contribute to the Funds. The Funds claimed the Carpentry Contractors owed delinquent fringe benefit contributions, including contractual late payment charges or liquidated damages, on behalf of certain of their employees for work

performed by the employees from August 1990 through February 1, 1992. The fringe benefit contributions were due pursuant to the terms of a collective bargaining agreement (the 'International Agreement") entered into between the Defendant-Appellants and the United Brotherhood of Carpenters and Joiners of America (the 'UBCJA"), a labor organization. Defendants-Appellants were represented during the negotiation of the International Agreement by their collective bargaining representative, the Michigan Carpentry Contractors' Association (the 'MCCA").

The Funds brought their claim under Section 301 of the Labor Management Relations Act ('LMRA"),[2] 29 USC §185 and SEctions 502(a)(3)[3] and 515[4] of the Employee Retirement Income Security Act ('ERISA"), 29 USC §§1132(a)(3) and 1145. On May 19 and 20, 1992, a non-jury trial was held before the Honorable Horace Gilmore. On May 21, 1992, the court issued its opinion from the bench, finding the International Agreement obligated the defendants to pay fringe benefit contributions for residential work performed during the period of August 1990 through February 1, 1992; the expiration of the Appellants' Local Agreement did not affect Appellants' liability to pay into the fund; and the Appellants were bound through the International Agreement to local wage agreements.

---

[2] LMRA Section 301(a) states:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties. 29 USC §185.

[3] ERISA Section 502(a)(3) provides that a civil action may be brought:

> by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan. 29 USC §1132(a)(3).

[4] ERISA Section 515 provides that:

> Every employer who is obligated to make contributions to a multi-employer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement. 29 USC §1145.

The parties, with the court's approval, agreed to bifurcate the issues of liability and damages. The issue of damages was referred to Magistrate Judge Virginia M. Morgan. The magistrate issued an amended report and recommendation on July 1, 1993. On September 7, 1993, the district court issued its Final Judgment in favor of the Funds, adopting the report and recommendation of the magistrate. This timely appeal follows.

B. Facts

The Defendant-Appellants are employers in the building and construction industry and are all members of the MCCA. Over the past twenty years the MCCA negotiated local collective bargaining agreements with the Carpenters District Council of Detroit (the 'CDC") covering residential carpentry/construction work. The last of these agreements expired August 1, 1989.

On May 16, 1989, the President of the UBCJA created Local Union 1234 and gave it the power to negotiate agreements covering residential carpentry work within eleven of the twelve counties covered by the CDC in southeastern Michigan, excluding Genesee County. Local Union 1234 was not affiliated with the CDC, consequently the CDC lost its authority to negotiate agreements covering residential carpentry work except in Genesee County. The MCCA negotiated an agreement governing residential construction work with Local Union 1234 and the UBCJA (the 'Residential Agreement") which was in effect from August 1, 1989 to August 1, 1990. Pursuant to this agreement the Appellants made contributions to the Funds.

On July 10, 1989, the MCCA and the UBCJA entered into a three-year agreement referred to as the International Agreement. Under paragraph two of the International Agreement, the MCCA agreed to company with contractual wages, fringe benefits, hours and other working conditions established between the UBCJA affiliates and the employers or recognized employer agencies in the localities in which the Company does any work within the jurisdiction of the UBCJA.

Paragraph three of the International Agreement provided:

Payment of pension and/or health and welfare contributions for an employee's work in each locality shall be made to such funds and in such amounts as are identified in the applicable collective bargaining agreements for that locality . . .
(J.A. 27)

The Appellants contend the Local Union 1234 contract covered residential work in the eleven counties listed in the Residential Agreement. Once the Residential Agreement expired on August 1, 1990, the Appellants argue they had no further obligation to contribute to the Funds. The Funds, on the other hand, argue that pursuant to paragraph 2 of the International Agreement, the Appellants were obligated to make contributions for any work performed in its jurisdictional area, including residential work.

In November 1989, the general president of the UBCJA returned jurisdiction over the residential carpentry field to the CDC in its entire twelve-county area. Local 1234 affiliated with the CDC, and the CDC became responsible for the enforcement of residential agreements, including the Residential Agreement and future negotiations of new agreements.

Prior to the expiration of the Residential Agreement, the CDC and the MCCA attempted to negotiate a new agreement. The negotiations failed to result in a new agreement and, following a contract extension, on August 15, 1989, the union went on strike in support of its contract demands. Between August 1990 and February 20, 1992, essentially all MCCA employers failed to make contributions to the Funds for residential work.

Effective February 1, 1992, the MCCA and Local 1234 entered into a new collective bargaining agreement. Following this agreement, the members of the MCCA, including all defendants, resumed contributions to the Funds.

II. DISCUSSION

We review the interpretation of the contractual provisions *de novo*. *Central States Pension Fund v. Behnke, Inc.*, 833 F.2d 454, 458 (6th Cir. 1989) *Carpenters Local Union No. 345 Health and Welfare Fund v. W.D. George Construction Co.*, 792 F.2d 64, 68 (6th Cir. 1986).

A. Jurisdiction

Appellants argue that the NLRB has exclusive jurisdiction of the claims raised in this case because they deal with representational issues. We agree, however, with the district court's findings that this matter is properly in the federal courts. There is no merit to Appellants' claim that the NLRB has exclusive jurisdiction.

B. The International Agreement

The International Agreement in question clearly states in paragraph two that the MCCA will comply with fringe benefits and hourly wages requirements 'in the localities in which the [MCCA]

does any work . . . ." (Emphasis added). There is no limitation in the agreement as to the locality of the work or the type of work performed, i.e. residential or commercial. The Appellants argue they did not intend to have the International Agreement affect their local bargaining conditions.

Correspondence between the parties, however, belies their argument. In response to a letter dated June 12, 1989, written by Don Doughty, who negotiated on behalf of MCCA, Dean Sooter, Vice President for the International Carpenters Union, wrote the following dated June 20, 1989:

> With respect to the Detroit metropolitan area, I explained that under the International Agreement, on commercial work the employer would apply the Detroit District Council conditions in Genesee County only, and the Local 1234 conditions for all other counties covered by Local 1234.
>
> This explanation, however, was not meant to imply that the International Agreement covers only Detroit area commercial and residential work. On the contrary, the International Agreement would be binding on each signatory employer all over the State of Michigan, and throughout the U.S. and Canada, wherever he may perform UBC work.

(J.A. at 378)

Without further correspondence, the president of the MCCA signed the International Agreement.

On its face, the International Agreement states that MCCA employer members are bound to contribute to the Funds for commercial and residential work. This court finds no ambiguity as to what is meant in paragraph two by the phrase 'in which the [MCCA] does any work within the jurisdiction of the UBCJA." Any work means just that, any work, including commercial and residential. Even if there were an ambiguity as to what was meant in the International Agreement, the correspondence between Sooter and Doughty manifests a clear intent of the parties to be liable for payments to the Funds for residential and commercial work.

III. CONCLUSION

For the foregoing reasons the decision of the Honorable Horace W. Gilmore, United States District Judge for the Eastern District of Michigan is **AFFIRMED**.

Case No. 93-2274

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ORDER

CARPENTERS' PENSION TRUST FUND-DETROIT AND VICINITY; CARPENTERS' HEALTH AND WELFARE FUND, DETROIT; CARPENTER'S VACATION & HOLIDAY TRUST FUND, DETROIT & VICINITY,

Plaintiffs-Appellees,

v.

CMK CONSTRUCTION, INC.; A&J INSULATION CORPORATION; CARPENTRY BY MASTERCRAFT; DAMICO CARPENTRY; ROBERT DANNA CARPENTRY CONTRACTOR, INC.; F.G. CONSTRUCTION CO.; FRF OAKLAND HILLS CARPENTRY; FIBER CLASS INSULATION; GERICK CONTRACTORS; HALE & SONS CONSTRUCTION; GEORGE I. LANDRY, INC.; LEO & KEVIN LIEDEL CONSTRUCTION; MICHIGAN CARPENTRY SYSTEMS, INC.; MICHIGAN DRYWALL, INC.; PALMER CUSTOM BUILDERS, INC.; RICHARD PARKER CARPENTER CONTRACTOR; RESAC HOMES, INC.; S&N DRYWALL, INC.; SUBURBAN INSULATION COMPANY; T&C DRYWALL, INC.; TROY CARPENTRY,

Defendants-Appellants.

A.J. CARPENTRY, et al.,

Defendants.

_____/

BEFORE: KEITH, JONES & MILBURN, Circuit Judges.

Upon consideration of the petition for rehearing filed by the defendant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED.**

ENTERED BY ORDER OF THE COURT

_____

Leonard Green, Clerk

Supreme Court, U.S.
FILED
AUG 16 1995
CLERK

No. 95-119

In The Supreme Court of the United States

October Term, 1995

CMK CONSTRUCTION COMPANY, ET AL.,
Petitioners,

v.

CARPENTERS' PENSION TRUST FUND – DETROIT AND VICINITY, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

SACHS, WALDMAN, O'HARE, HELVESTON, HODGES & BARNES, P.C.
By: GEORGE H. KRUSZEWSKI (P25857)
Counsel of Record
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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I.

DOES THE NATIONAL LABOR RELATIONS BOARD HAVE EXCLUSIVE JURISDICTION OF THIS DISPUTE?

II.

DID THE NATIONAL LABOR RELATIONS BOARD ISSUE A PRIOR DECISION IN THIS MATTER TO WHICH THE COURTS BELOW SHOULD HAVE DEFERRED?

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No. 95-119

In The

Supreme Court of the United States

October Term, 1995

CMK CONSTRUCTION COMPANY, ET AL.,

Petitioners,

v.

CARPENTERS' PENSION TRUST FUND – DETROIT AND VICINITY, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Carpenters' Pension Trust Fund–Detroit and Vicinity, et al.[1] respectfully request that this Court deny the petition for writ of certiorari which seeks review of the Sixth Circuit's opinion below. That Opinion, which is unpublished, is reprinted beginning at Page 12 of the Appendix to the petition.

OPINIONS BELOW

Respondents disagree with the Petitioners' inclusion of the following in the "Opinions Delivered" section of their petition:

> National Labor Relations Board Order withdrawing Complaint, Dismissing Charge, and Withdrawing Notice of Hearing, dated June 18, 1991.

---

1 **The full list of Petitioners and Respondents is included in the "List of Parties" section of the petition for certiorari.**

National Labor Relations Board Dismissal of Charge, dated September 10, 1991.

These documents are not official or unofficial reports of opinions delivered in this case by other courts or administrative agencies, as required by Rule 14.1(d) for inclusion in the petition. Instead, they are mere administrative dismissals by the Regional Director of the Seventh Region of the National Labor Relations Board of unfair labor practice charges brought in proceedings unrelated to the instant case by Charging Parties other than the Respondents herein.

STATUTES INVOLVED

In addition to the statutory provision cited by Respondent to this court, 29 U.S.C. Section 185, Respondents also call the Court's attention to the following statutory provisions upon which the Respondents also relied in bringing this action — Sections 502(a)(3)[2] and 515[3] of the Employee Retirement Income Security Act (ERISA), 29 USC § 1132(a)(3) and 1145.

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[2] **ERISA Section 502(a)(3) provides that a civil action may be brought:**

> **by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan. 29 USC § 1132(a)(3).**

[3] **ERISA Section 515 provides that:**

> **Every employer who is obligated to make contributions to a multi-employer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement. 29 USC § 1145.**

STATEMENT OF THE CASE

A. An International Agreement Is Negotiated Between Local Union 1234 And The Michigan Carpentry Contractors Association Effective July 10, 1989 Through July 10, 1992.

The Petitioners are members of the Michigan Carpentry Contractors Association (hereinafter MCCA) and have delegated to that Association the power to negotiate collective bargaining agreements on their behalf with the United Brotherhood of Carpenters and Joiners of America (UBCJA). (Pl. Ex. 2)[4] In the past, the MCCA and several other Employer Associations had negotiated agreements with the Carpenters District Council of Detroit (CDC) (Pl. Ex. 13), covering residential construction work performed within the twelve county geographic jurisdiction of the CDC. The last of these agreements expired August 1, 1989. (Pl. Ex. 13 "Settlement–August 1, 1988").

On May 16, 1989, the President of the UBCJA created Local Union 1234 and gave it the power to negotiate agreements covering residential carpentry work within eleven of the twelve counties covered by the CDC, with the only exclusion being Genesee County. Local Union 1234 was not affiliated with the CDC. As a result of the General President's action, the CDC lost the power to negotiate agreements covering residential carpentry work except in Genesee County. (William Fair at TR. 42-44).

On July 10, 1989, the MCCA and the UBCJA entered into a three year agreement (hereinafter referred to as the "International Agreement"). (Pl. Ex. 1). It is this agreement upon which this suit is based. The agree-

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[4] References to Trial Transcripts are stated as Tr.___; Trial Exhibits are referred to as Pl. Ex.___ or Def. Ex.___.

ment was negotiated by the Executive Director of the MCCA, James "Don" Doughty. (James Doughty at TR. 114, 116, 144). Under Paragraph 2 of the International Agreement, the MCCA agreed to ". . . comply with contractual wages, fringe benefits, hours and other working conditions established between the UBCJA affiliates and the employers or recognized employer agencies in the localities in which the Company does any work within the jurisdiction of the UBCJA." Paragraph 3 of the agreement between the MCCA and the UBCJA provided:

> Payment of pension and/or health and welfare contributions for an employee's work in each locality shall be made to such funds and in such amounts as are identified in the applicable collective bargaining agreement for that locality * * *

This agreement was the first such agreement with an international union signed by the MCCA. (James Doughty at TR. 152).

Prior to the International Agreement being signed, on April 26, 1989 and June 12, 1989, Mr. Doughty wrote the First General Vice President of the UBCJA, Dean Sooter, with questions he had concerning the signing of the International Agreement. In his June 12th correspondence, Mr. Doughty expressed his view to Mr. Sooter that in signing the International Agreement . . . "we are only signing for those members doing Commercial Work under the jurisdiction of the Carpenters District Council and Residential Work in Genesee County." (Pl. Ex. 14).

On June 20, 1989, Mr. Sooter replied to Mr. Doughty (Pl. Ex. 15) and informed him that there appeared to be some misunderstanding of Mr. Sooter's earlier May 5, 1989 letter to Mr. Doughty since in that letter he had explained that " * * * the International Agreement would apply to *any* work within the UBC's jurisdiction, wherever it was performed (emphasis added) and that the International Agreement would require the application of whatever local wages and conditions were in

effect in each area where work was performed. Mr. Sooter added that on work performed within the Detroit Metropolitan area he had explained in his earlier letter that:

> * * * under the International Agreement, on *commercial* work the employer would apply the Detroit District Council conditions. For *residential* work under the International Agreement, the employer would apply the Detroit District Council conditions in Genesee County only, and the Local 1234 conditions for all other counties covered by Local 1234.

He cautioned Mr. Doughty that this explanation was not meant to imply that the International Agreement covered only Detroit area commercial and residential work:

> On the contrary, the International Agreement would be binding on each signatory employer all over the State of Michigan, and throughout the U.S. and Canada, where he may perform UBC work. In each locality where work is performed, the employer would look to the appropriate local agreement to determine what wages, etc. apply, but he would not actually need to sign locally in each area unless he wished to do so.

Mr. Sooter concluded that if this understanding was not acceptable to Mr. Doughty, that Mr. Doughty should let him know " * * * and we will return your documents unsigned." The MCCA and the UBCJA signed the International Agreement, without any limitation as to geographic scope or type of work, *after* this exchange of letters. No representative of the CDC participated in these negotiations. (William Fair at TR. 76, 77).

B. Local Union 1234 And The MCCA Also Negotiate A Residential Agreement Effective August 1, 1989 Through August 1, 1990. Later The CDC Becomes Responsible For This Agreement's Enforcement And For The Negotiation Of A Successor Agreement.

After the International Agreement was signed, Local Union 1234, the MCCA, and other Employer Associations signed a separate agreement covering residential carpentry work to be performed in the eleven county area (which did not include Genesee County), effective August 1, 1989 through August 1, 1990. (Pl. Ex. 10).

In November of 1989, the General President of the UBCJA returned jurisdiction over the residential carpentry field to the CDC in its entire 12-county area. Local 1234 affiliated with the CDC, and the CDC became responsible for the enforcement of residential agreements, including the agreement between the MCCA and Local 1234, and for the negotiation of new agreements. (William Fair at TR. 47-48).

For approximately 60 days prior to the August 1, 1990 expiration of the agreement initially negotiated between Local 1234 and the MCCA, the CDC and the MCCA attempted to negotiate a new agreement. These contract negotiations did not result in a new agreement and the CDC struck in support of its contract demands, following a contract extension, on August 15, 1990.

C. The CDC Files Unfair Labor Practice Charges With The National Labor Relations Board Because Of The MCCA's Failure To Continue To Make Fringe Benefit Contributions Following The August, 1990 Expiration Of The Contract.

Prior to August 15, 1990, all of the Petitioners had made fringe benefit fund contributions to the Respondent Funds for both residential and commercial carpentry work. Subsequent to August 15th, all of the Petitioners, and other members of the MCCA, continued

to make contributions to the funds on behalf of their employees for commercial carpentry work performed by them.[5] However, the Petitioners ceased making contributions for residential carpentry work (except for a brief period in February, 1991). (William Fair at TR. 55-57).

On August 20, 1990, the CDC filed an unfair labor practice charge with the National Labor Relations Board (Def. Ex. 18) against the MCCA. Specifically the CDC alleged in the charge that the MCCA had violated Section 8(a)(5) of the National Labor Relations Act, 29 USC, § 158(a)(5), when, following the contract's August termination, it unilaterally changed wages, hours, and working conditions. After initially issuing Complaint, the Regional Director for the NLRB ultimately dismissed the charge based upon the NLRB's prior decision in *John Deklewa and Sons, Inc.*, 282 NLRB 1375 (1987). That dismissal was sustained on appeal by the General Counsel for the NLRB.

D. The CDC Learns Of The Existence Of The International Agreement And The Strike Is Terminated.

Initially, the CDC struck both MCCA commercial and residential construction projects. The MCCA, through Mr. Doughty, complained to the President of the International Union, notifying him on August 22, 1990 that the MCCA was not negotiating a commercial agreement in the Detroit area and that its members were paying the negotiated wages and fringe benefits on commercial projects. (Def. Ex. 25). In his reply to Mr. Doughty also sent on August 22, 1990, the General President stated:

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5 Mr. Doughty acknowledged that the MCCA had not signed a local agreement covering commercial carpentry work, and as a result, that the MCCA's members were contributing for commercial work under the International Agreement. (James Doughty at TR. 145). Contractors are not required to sign local agreements in order to contribute to fringe benefit funds under International Agreements. (William Fair at TR. 72).

> It is the established policy of this union that employers signatory to an international agreement are not subject to work stoppages resulting from local negotiations, provided that such employers do not participate directly in the local negotiations and agree to abide by any settlement reached in such negotiations.
>
> (Def. Ex. 24).

Since the MCCA was participating in negotiations with the CDC only for a local residential, and not a commercial, agreement, and was continuing to comply with the negotiated wages and benefits under the local commercial agreement, the General President concluded that any work stoppage by the CDC against MCCA member contractors could only affect residential projects. Thus, he directed the CDC to cease any strike activity against members of the MCCA on any projects performed in accordance with the terms and conditions of the local commercial agreement. (Def. Ex. 24).

The CDC first became aware of the existence of the International Agreement as a result of the August 22, 1990 letter from the General President of the UBCJA to the MCCA (William Fair at TR. 50-51). After learning of this agreement, the CDC, through its then Secretary-Treasurer/Business Manager Daniel Kelley, wrote Mr. Doughty to inform him that it was the Union's position that under this agreement, the members of the MCCA, notwithstanding the expiration of the agreement between Local 1234 and the MCCA, were required to contribute to the plaintiff funds at the rates established in the area through contracts between the CDC and other employers performing such work. It notified the MCCA of the rates that it expected the MCCA's members to pay[6] and that it was notifying its own members to end their strike and return to work. (Pl. Ex. 26).

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[6] During the period August 1, 1990 through February 1, 1992, the CDC and a number of other Employer Associations and Em-

(*concluded on page 9*)

On December 9, 1991, the General President of the UBCJA returned to Local 1234 the exclusive jurisdiction over the residential carpentry work in the eleven counties that it had previously covered. Effective February 1, 1992, the MCCA and Local 1234 entered into a new collective bargaining agreement. (Def. Ex. 22). Following this agreement, the members of the MCCA, including all of the Petitioners, resumed contributions to the funds.

E. The Respondent Fringe Benefit Funds File Suit Under The International Agreement To Collect Delinquent Fringe Benefit Fund Contributions. The District Court Rules In Their Favor.

In their First Amended Complaint (R. Ex. 8), the Respondent Funds claimed that the Petitioner Employers owed delinquent fringe benefit contributions, including contractual late payment charges or liquidated damages, on behalf of certain of their employees from work performed by them from August, 1990 through February 1, 1992 under the terms of the International Agreement.

A non-jury trial was held before the Honorable Horace Gilmore on May 19 and 20, 1992. On May 21, 1992, Judge Gilmore issued his Opinion[7] from the bench. In it, after first rejecting the defendants' claim that the NLRB preempted this action, (Opinion of Court at 2), he agreed

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(*continued from page 8*)

ployers negotiated collective bargaining agreements covering residential carpentry work. (William Fair at TR. 73-74). These agreements established a uniform schedule of fringe benefit contribution rates. (William Fair at TR. 73-75, 103). It was these rates that Mr. Kelly included in his letter. Mr. Doughty, a trustee of the plaintiff funds, acknowledged that non-MCCA member contractors contributed to the funds for residential work performed by their employees during this time period and that some of these contractors performed the same type of residential work as members of the MCCA. (James Doughty at TR. 151).

7 The Opinion is reported at pages 876 through 885 of the Trial Transcript, which is attached to the Petitioners' Lodgings.

with the plaintiff funds and found that the defendants were liable for fringe benefit contributions for residential carpenters for the period of August, 1990 through February 1, 1992. He based this conclusion on those provisions of the International Agreement:

(1) which required the MCCA to "comply with contractual wages, fringe benefits, hours and other working conditions established between the UBCJA affiliates and the employers or recognized employer agencies in the localities in which the Company does any work within the jurisdiction of UBCJA" (Pl. Ex. 1, Paragraph 2); and

(2) which provided: "Payment of pension and/or health and welfare contributions for an employee's work in each locality shall be made to such funds and in such amounts as are identified in the applicable collective bargaining agreement for that locality." (Pl. Ex. 1, Paragraph 3; *Id.* at 5-6, 8-9). He found that there were several local agreements between the CDC and other contractors or associations in effect during the period of August 1, 1990 to February 1, 1992, which established the rates of fringe benefit contributions for the area and that these agreements collectively, since they contained uniform rates, were the "applicable collective bargaining agreement" referred to in the International Agreement. (*Id.* at 5-6).

He rejected the defendants' argument based upon the fact that they were not party to a local agreement after August 1, 1990, noting that contractors operating under International Agreements with the UBCJA are only required to comply with, and not to sign, agreements with the local unions or district councils in the geographic area in which they are working. (*Id.* at 6-7). The fact that the MCCA lacked a local agreement which they themselves had negotiated did not matter, with the

Court noting that since the defendants recognized that the International Agreement would require them to pay contributions at the rate established in local agreements when working outside of the eleven-county area, there was no basis for their belief that the International Agreement would not also bind them in a like manner within that area. (*Id.* at 9). He also concluded that the expiration of the local agreement could affect only the rate of fringe benefit payments, but did not affect the liability to pay into the funds. (*Id.* at 8).

He finally rejected the defendants' argument that the International Agreement was meant only to cover commercial and not residential work, on the basis that there was no language in the International Agreement which so limited coverage and that Dean Sooter's letter of June 20, 1989, the last written correspondence concerning the party's intentions in making the agreement, clarified any possible ambiguity and established the "... parties' intention that the International Agreement applie[d] both to commercial and residential work and that the Defendants would be bound to local wage agreements to which they had not actually signed." (*Id.* at 6, 9-11). He ended:

> In sum, I find that the International Agreement obligated Defendants to pay fringe benefit contributions for the residential carpenters for the period from August, 1990 through February 1, 1992 after the Local 1234 agreement had expired. I will therefore order this amount be paid.
>
> (*Id.* at 11).

The parties, with the Court's approval, agreed to bifurcate the issues of liability and damages. The issue of damages ultimately was referred to a magistrate. On September 7, 1993, Judge Gilmore issued his Final Judgment in favor of the funds. (Petitioners' Appendix at 8-11).

F. The Sixth Circuit Affirms The District Court's Decision.

Defendants filed a timely Notice of Appeal with the United States Court of Appeals for the Sixth Circuit on September 29, 1993. On January 12, 1995, the Sixth Circuit issued its Opinion affirming the decision of the Court below. On February 17, 1995, that Court denied a Petition for Rehearing. (Petitioners' Appendix at 12-19).

In their Petition, petitioners assert that:

> The Sixth Circuit Court of Appeals found that even though there were representational issues involved, the District Court did not err in refusing to consider the prior NLRB representational determination.
>
> (Petition at 10).

This characterization of the Sixth Circuit's Opinion is in error. At no point did the Sixth Circuit state that it believed that there were representational issues involved in the case. Instead, the Court only noted that the appellant employers were arguing that there were representational issues involved in the case and thus, that the NLRB had exclusive jurisdiction of the matter. The Court then agreed with the District Court's findings that this claim had no merit and that the matter was properly in the federal courts.

Instead of viewing the case as a representational one, the Sixth Circuit considered it as one of mere contract interpretation, noting that it reviewed the District Court's interpretation of the contractual provisions *de novo*. After doing so, that Court agreed with the District Court's conclusion that the International Agreement bound the appellant employers to contribute to the Funds on both commercial and residential carpentry work, wherever that work was performed.

SUMMARY OF THE ARGUMENT

The specific issue presented in this case involves the obligations of the members of a multi-employer association to continue to make fringe benefit contributions at the rates established in the area, under the provisions of an agreement unlimited in scope negotiated by their bargaining representative and an International Union, after a local agreement negotiated by that same bargaining representative and an affiliate of that same International Union has expired.

In their attempt to persuade this Court to hear this matter, Petitioners, of course, disagree with this characterization of the issue, since they are aware that mere issues of contract interpretation undoubtedly would not be deemed worthy of this Court's review. Instead, Petitioners argue

(1) that this case involves questions of representation which had to be, and were, first resolved by the NLRB;

(2) that the decision of the Sixth Circuit, which held that the International Agreement applied to both residential and commercial carpentry work, conflicted with this prior decision of the NLRB; and

(3) that review by this Court, thus, is appropriate because the Sixth Circuit's decision either involves important unresolved issues of federal law or conflicts with prior decisions of this Court, and other courts of appeal, which have held that the NLRB has exclusive jurisdiction in representational matters.

The Petitioners are wrong on all counts. This case does not involve representational issues and, even if it did, the courts would have concurrent jurisdiction with the NLRB to decide such issues. Moreover, the NLRB has not issued a decision on the issues presented in this case and there was no conflict between the deci-

sions of the Courts below and any prior determination by the NLRB. Thus, no basis for review by this Court has been established.

REASONS FOR DENYING THE WRIT

I.

THE NATIONAL LABOR RELATIONS BOARD DOES NOT HAVE EXCLUSIVE JURISDICTION OVER THIS DISPUTE WHICH DOES NOT INVOLVE REPRESENTATIONAL ISSUES. INSTEAD, THE FUNDS SUED TO ENFORCE AN EXISTING AGREEMENT BETWEEN THE MCCA AND THE UBCJA.

Petitioners argue that the courts below lacked jurisdiction of this dispute because it allegedly involved a representational issue which was within the exclusive jurisdiction of the National Labor Relations Board (NLRB) and upon which, they contend, the NLRB has already ruled. They base this claim upon the unfair labor practice charge (Def. Ex. 18) filed by the Carpenters District Council of Detroit and Southeastern Michigan (CDC) against the MCCA following the expiration of the August 1, 1989 through August 1, 1990 agreement between Carpenters Local 1234 and the MCCA.[8] Specifically the CDC alleged in the charge that the

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8 **Petitioners also attempt to rely on a separate unfair labor practice charge filed by an individual, Jon Baddor, against one of the members of the MCCA, Harris Homes. That charge was eventually dismissed on the same basis as the earlier charge filed by the CDC,, i.e., because the collective bargaining agreement had expired on August 1, 1990, and that by virtue of Section 8(f) of the NLRA, the Employer was under no obligation to continue fringe benefit contributions.**

This document was rejected by the District Court (Trial Tr. 182-186). There is no evidence that the Petitioner raised the propriety of that rejection as an issue before the Sixth Circuit. This document was not included as part of the Joint Appendix to that Court. (See Appendix Index). Thus, this document is not properly before this Court for its review.

(*concluded on page 15*)

MCCA had violated Section 8(a)(5) of the National Labor Relations Act, 29 USC, § 158(a)(5), when, following the contract's termination, it unilaterally changed wages, hours, and working conditions. The Regional Director for the NLRB ultimately dismissed the charge based upon the NLRB's prior decision in *John Deklewa and Sons, Inc.*, 282 NLRB 1375 (1987).

Deklewa involved a change in the NLRB's interpretation of Section 8(f) of the NLRA, 29 USC § 158(f) which allows employers and unions in the construction industry to enter into labor agreements irrespective of whether a majority of the workers affected by the agreements desire representation. Prior to *Deklewa*, such agreements were terminable at will. After *Deklewa*, such agreements are enforceable through their expiration date; but beyond that point, since the Union does not enjoy a presumption of majority status, the Employer has no continuing duty to bargain and can unilaterally change wages, hours, and working conditions. It was for this reason that the Regional Director, in an action later sustained on appeal, dismissed the charge filed by the CDC against the MCCA's actions following the expiration of the Local 1234 contract. See also *Fox Painting Company* v *NLRB*, 919 F2d 53, 55 (6th Cir., 1990).

From these facts, the Petitioners reach the erroneous conclusion, as seen below, that this matter should have been dismissed because the NLRB has exclusive jurisdiction over representation matters and because the NLRB allegedly has already decided that the International Agreement did not cover residential carpentry work.

(*continued from page 14*)

In any case, even if it had been received, this document would have been entitled to no consideration. Neither the Respondents, nor the CDC, were parties to that proceeding. Moreover, there is no support for Petitioners' argument that the Regional Director based his dismissal of the charge on the International Agreement. Finally, for the reasons, stated infra, his dismissal of the charge was a mere administrative determination, entitled to no res judicata effect.

A. The NLRB's Dismissal Of The Unfair Labor Practice Charge Filed By The Carpenters District Council Of Detroit Is Entitled To No Res Judicata Or Collateral Estoppel Effect.

The initial, but by no means the worst, flaw in the Petitioners' argument is their contention that the NLRB has decided anything. All that has occurred is that the Regional Director, acting for the General Counsel of the National Labor Relations Board, has refused to issue a Complaint based upon the CDC's unfair labor practice charge against the MCCA. This administrative action was not a judicial determination on the merits of the CDC's claim and thus has no res judicata or collateral estoppel effect. *Warehousemen's Local No. 206* v *Continental Can Co.*, 821 F2d 1348, 1351-1352 (9th Cir., 1987) (and cases cited therein). *Thomas* v *Consolidated Coal Co.*, 380 F2d 69, 78 n.12 (4th Cir. 1967), *cert denied* 389 U.S. 1004 (1967). By contrast, in the cases relied upon by Petitioners, the NLRB actually had issued a final decision following a full hearing on the merits.

Moreover, whatever the Regional Director decided, the decision did not concern this particular dispute. The proceedings before the NLRB involved a charge brought by the CDC against the MCCA based upon the MCCA's actions following the August 1, 1990 expiration of the MCCA's agreement with Local 1234. In contrast, the contract that the funds sued to enforce here was a totally separate agreement between the International Union and the MCCA *which had not expired*, but which remained in effect through July 18, 1992. Moreover, contrary to the assertion repeatedly made by Petitioners in their petition, the Regional Director made no determination concerning the validity or continued enforceability of the International Agreement — an issue which could not even have been presented to him since the CDC was not a party to this agreement — only its International Union was.

B. There Are No Representational Issues Present In This Case.

Contrary to the Petitioners' assertion, this dispute does not involve a representational issue, i.e., which of two competing labor organizations should represent the Petitioners' employees, which allegedly should have been deferred to the exclusive competence of the NLRB. Instead, the only issues presented involved the interpretation of the International Agreement.

C. Even If Representational Or Unfair Labor Practice Issues Were Presented In This Case, The Courts And The NLRB Would Have Concurrent Jurisdiction To Decide Them.

In *Smith* v *Evening News Association*, 371 U.S. 195, 197-98 (1962), this Court held that under § 301(a) of the LMRA, 29 USC § 185(a), a dispute which involves an unfair labor practice within the province of the NLRB may nonetheless justify the invocation of federal court jurisdiction where the dispute arises out of a collective bargaining agreement. Thus, under *Smith*, the funds may bring suit here to enforce the International Agreement even though the Petitioners' actions in refusing to comply with its terms might also have been styled as an unfair labor practice by the NLRB.

Moreover, as this Court later held in *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261 (1964), even if there were representational issues present in this case, the jurisdiction of the Courts would not have been affected. In *Carey*, the petitioner union had filed a grievance asserting that certain employees in the engineering lab at the plant in question, who were represented by another union, should be included within its bargaining unit. The Employer refused to arbitrate, contending that the controversy presented a representation matter for the NLRB. The state courts agreed and refused to order arbitration.

This Court reversed. The Court felt that the case could be styled as either a work assignment, or a representational dispute. If it were a work assignment dispute, it clearly could be resolved under traditional grievance arbitration procedures. If the controversy was a representational one, involving the duty of the Employer to negotiate with the representative of its employees, unfair labor practice charges or a petition for unit clarification could have been filed with the NLRB to resolve the dispute. If in the meantime, the matter had proceeded to grievance arbitration, the NLRB could show deference to the arbitrator's award. If it did not, and if the NLRB disagreed with the arbitrator's determination, by ruling that the employees involved were members of one bargaining unit or another, the NLRB'S ruling would take precedence. *Id.* at 272. However, the mere possibility of conflict was no barrier to resort to a tribunal other than the NLRB. The case should have been allowed to proceed to arbitration.

Thus, contrary to Petitioner's assertion, this Court already has decided in *Smith* and *Carey* the issues allegedly presented below. The Courts would have concurrent jurisdiction with the NLRB to decide this matter, whether or not unfair labor practice issues or representational issues were involved. It would only be if the Courts and NLRB issued conflicting decisions that the issue of whose ruling should take precedence would have to be reached. However, as seen above, that issue need not be reached here since the NLRB has decided nothing.

Finally, even if the NLRB had issued a decision on the charges filed by the CDC against the MCCA, a conflict would not be presented since the issues presented to the NLRB and the Courts below in the instant case were not the same, as seen above.

II.

CONTRARY TO PETITIONERS' ASSERTION, NEITHER THIS COURT, NOR ANY OTHER COURT, HAS EVER DECIDED THAT A NO-STRIKE CLAUSE IS A REQUIREMENT OF A VALID CONTRACT.

In their petition, the Petitioners make the incredible assertion that:

> This Court has long held that the no-strike clause is the quid pro quo for the contract. Without a no-strike clause there can be no contract since there is no quid pro quo. See *Carey* v. *Westinghouse*, 375 U.S. 261 (1964).
>
> Petition at 16.

Petitioners later contend:

> The NLRB acknowledge the understanding of the parties by finding that the International Agreement did not apply to the residential employees. The NLRB determination took into consideration the national labor policy aspects of the relationship between the parties, and recognized that there can be no contract without a no-strike clause.
>
> Petition at 18.

Petitioners then argue that the Decisions below conflict with these alleged principles because the UBCJA's International President had notified the MCCA that the no-strike clause of the International Agreement would not apply while the MCCA and the CDC were in negotiations for a successor local residential agreement. Petitioners contend, based upon the alleged principles espoused above, that without the no-strike clause, the International Agreement was invalid, that the District Court and Sixth Circuit should have so found, and that this Court should grant review of this matter because of their failure to do so.

This argument can be discarded on either of two grounds. First, this argument was not raised by Petitioners below and thus, obviously, was not considered by either the District Court or the Sixth Circuit. Thus, it is not properly before this Court for its consideration. Second, even if the argument had been raised below, it would have been summarily rejected. Clearly, neither this Court, either in *Carey*, or in any other decision, nor any lower court, nor the NLRB has ever held that a contract without a no-strike clause is invalid. Instead, a no-strike clause simply has been regarded as a mandatory subject of bargaining which clearly can be, but does not have to be, included as part of a collective bargaining agreement. Thus, the General President's suspension of the no-strike clause of the International Agreement during local negotiations did not affect the continuing validity of the International Agreement[9] and no basis for this Court's review has been established.

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9 The error in the Petitioners' position has been that they read the position of the General President too broadly, as if he were suspending the operation of the *entire* International Agreement, including the obligation to continue payment of fringe benefit contributions, while local negotiations were ongoing. However, this is clearly not what the MCCA was told. Instead, in the first correspondence between Dean Sooter and Mr. Doughty on May 5, 1989, Mr. Doughty was told that the International Agreement *would* remain in effect during negotiations, with *only* the no-strike clause not being in effect. Thus, despite the fact that it was engaged in negotiations, the Petitioners remained obligated, under Paragraph 2 of the International Agreement to " . . . comply with contractual wages, fringe benefits, hours and other working conditions established between the UBCJA affiliates and the employers or recognized employer agencies in the localities in which the Company does any work within the jurisdiction of the UBCJA."

CONCLUSION AND RELIEF REQUESTED

Based upon the arguments advanced above, and the record as a whole, Respondents respectfully request that this Court deny Petitioners' request for a writ of Certiorari.

Respectfully submitted,

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Dated: August 15, 1995

(3)

Supreme Court, U.S.
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No. 95-119

In The
Supreme Court of the United States

October Term, 1995

CMK CONSTRUCTION, INC., *ET AL.*,
Petitioners,

v.

CARPENTERS' PENSION TRUST FUND – DETROIT AND VICINITY, *ET AL.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

Petitioners respectfully request that this Court grant certiorari to require the district court and court of appeals to follow the NLRB determinations that are dispositive of the issues that were before the courts.[1] The NLRB determinations are reprinted at pp. 1-7 of the appendix to the petition.

Respondents' Brief in Opposition misstates Petitioners' argument and makes allegations which are belied by the record.

I.

THE COURTS SHOULD DEFER TO THE NLRB DECISIONS.

Petitioners are not arguing that the representational issues in this matter "had to be" resolved by the NLRB.

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1 None of the petitioners has a parent company or a subsidiary.

The NLRB and the district court had concurrent jurisdiction over this matter involving both the representational issue (whether the International Agreement covered the residential employee group) and the contractual issue (if the International Agreement did apply to the residential employee group, whether the employers were obligated under it to make fringe benefit contributions on behalf of the residential employees). However, the doctrine of *primary* jurisdiction holds that the NLRB, not the courts, decides *whether* there was a representational issue involved. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959); *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72 (1982).

Once the NLRB decided there was a representational issue, and then decided the representational issue (that the International Agreement does not cover the residential employees), the courts cannot find that there was not a representational issue, and the district court must follow the NLRB's decision on the representational issue. *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261 (1964); *McGuire* v. *Humble Oil and Refining Co.*, 355 F.2d 352 (2nd Cir. 1966); *Local 342* v. *Valley Engineers*, 975 F.2d 611 (9th Cir. 1992); *Smith Steelworkers* v. *A. O. Smith Corp.*, 420 F.2d 1 (7th Cir. 1969); *Local 204* v. *Iowa Electric Light and Power Co.*, 668 F.2d 413 (8th Cir. 1982); *Carpenters Local 1846* v. *Pratt-Farnsworth*, 690 F.2d 489 (5th Cir. 1982). As the Fifth Circuit stated in *Pratt-Farnsworth*, if the NLRB determination is not appealed, the court should accept the NLRB determination as conclusive; to allow a § 301 suit to challenge a prior NLRB decision allows a "second bite at the apple".

Respondents incorrectly state that the district court's rejection of the second NLRB charge filed in this matter was not raised by Petitioners before the Sixth Circuit (Brf. in Op., p. 14). In fact, Petitioners "submit[ted] that such refusal was erroneous", App. Brf., pp. 18-19, and referred to the charge throughout the appeal brief. See App. Brf., pp. 13, 14, 18-19. Petitioners also argued in the

brief "This Court is urged to find that the issues raised by Appellees below were preempted by the Board's finding that there was no representational rights, and no obligation to make Fund contributions under the International Agreement." App. Brf., p. 19.

Respondents also incorrectly state that the dismissed second charge was not included in the Joint Appendix to the Court of Appeals. However, the Joint Appendix Index includes "Defendant Trial Ex. 18 (Documents relating to NLRB *Cases*)" (emphasis added). Jt. App., p. iv. The second NLRB charge and the error of the district court's refusal to consider the charge were clearly raised before the Sixth Circuit, and are properly before this Court for review.

II.

IF A COLLECTIVE BARGAINING AGREEMENT CONTAINS A NO-STRIKE CLAUSE AS THE QUID-PRO-QUO, SUSPENSION OF THAT CLAUSE VOIDS THE ENTIRE CONTRACT.

Respondents also incorrectly state that Petitioners did not raise another issue, that the International Vice President stating the no-strike clause is inoperable meant that the International Agreement was inapplicable in its entirety, before the Court of Appeals. Petitioners raised this issue before the Court of Appeals; in their Appeal Brief, Petitioners quoted the International Vice President:

> Second, it is possible for an international signatory to *participate in negotiations for a Local Agreement in their home area while still holding the international agreement.* When this occurs, the no strike clause would not be in effect with respect to that area where the employer is engaged in local bargaining. (emphasis added).

App. Brf., p. 11. Petitioners then stated that MCCA President Doughty understood the International Vice

President's statement to mean that the International Agreement did not affect the residential employee group and its bargaining relationship with Petitioners, and again quoted the International Vice President:

> While your local negotiations were going on, the no strike clause of the International Agreement would not be in effect for MCCA members on residential work within Local 1234's territorial area.

App. Brf., p. 12. Petitioners also argued that both parties understood the letters regarding the no-strike clause to mean that the Union did not intend for the International Agreement to apply to residential/local negotiations, especially since the International Vice President (Souter) did not testify at the trial.[2] *Id.* Petitioners clearly raised the issue of the International Vice President's reference to the no-strike clause meaning the International Agreement did not apply to the residential employees to the court of appeals, and the issue is properly before this Court for review.

Petitioners are not arguing that all collective bargaining agreements must contain a no-strike clause, as Respondents state. Petitioners are stating that when a contract contains a no-strike clause as the quid pro quo, the entire contract is void if the no-strike clause is suspended. The letters of the International Vice President do not make sense in any other context. *It is nonsensical to state that the right to bargain over local conditions is preserved while at the same time stating that the International Agreement applies to local negotiations.* Petitioners understood that they retained their

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[2] Specifically, Doughty testified that the International Agreement would not affect local negotiations, and at no time did the International Union lead the employers to believe that the employers could be bound by a residential contract in their local area that they themselves had not negotiated and signed (TR, 123-124, App. Brf., p. 12).

right to bargain over residential (local) terms and conditions notwithstanding the existence of the International Agreement covering commercial work, as confirmed by the International Vice President both before and during the local negotiations.

The NLRB understood the unique relationship between the parties and the nonsensical result of the International Agreement applying to the residential (local) employee group when the Union had assured the employers they would retain their right to bargain over residential (local) terms and conditions of employment; Respondents should not be allowed to challenge the NLRB determination via a § 301 action.

CONCLUSION

For the foregoing reasons and the reasons stated in the Petition for Writ of Certiorari, this Court should grant a writ of certiorari to the Court of Appeals for the Sixth Circuit to review its decision in this case and reinforce the principle of courts following the NLRB's expertise when the NLRB has made a decision which impacts the issues in a § 301 action.

Respectfully submitted,

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